United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1435

To be argued by
JOHN R. WING

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1435

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN M. KING and A. ROWLAND BOUCHER,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

John M. King and A. Rowland Boucher appeal from judgments of conviction entered in the United States District Court for the Southern District of New York after a six week trial before the Honorable Marvin E. Frankel, United States District Judge, and a jury.

Indictment 75 Cr. 70, filed January 20, 1975, in four counts, charged King and Boucher with conspiracy and mail, wire and securities fraud in connection with the valuation of oil and gas interests of an off-shore mutual fund. Specifically, Count One charged the defendants with having devised a multi-million dollar scheme to defraud 150,000 shareholders of the mutual fund in violation of Title 15, United States Code, Section 78j(b); Count Two charged a mail fraud in violation of Title 18, United States Code, Section 1341; Count Three charged

a wire fraud in violation of Title 18, United States Code, Section 1?43; and Count Four charged a conspiracy to violate the aforementioned fraud statutes in violation of Title 18, United States Code, Section 371.

Trial commenced on May 24, 1976 and concluded on July 1, 1976, when the jury returned verdicts of guilty on all counts against both defendants.

On September 7, 1976, Judge Frankel sentenced King to concurrent terms of one year's imprisonment on Counts One, Three and Four, to be followed by a term of three years' unsupervised probation on Count Two. On that same date, Boucher was sentenced to a term of seven months' imprisonment, to be followed by a term of three years' unsupervised probation on Count Two.

Both King and Boucher are enlarged on $10,000 personal recognizance bonds pending this appeal.

Statement of Facts

The Government's Case

A. Synopsis

The Government proved at trial that King and Boucher masterminded a sophisticated and massive fraud that bilked the shareholders of the Fund of Funds (FOF), a Canadian mutual fund, of millions of dollars. In the 1960's, King and Boucher, the Chairman and President, respectively, of King Resources Company (KRC), were engaged in the sale of oil, gas and other natural resource interests. In 1968, King and Boucher convinced FOF's directors to establish a proprietary fund which was to invest exclusively in natural resource properties purchased from or through KRC. This arrangement enabled King and Boucher, on behalf of KRC, to sell pre-

viously acquired oil and gas interests to FOF at huge markups, but the continuation of such sales depended on the defendants' ability to demonstrate to FOF that these natural resource investments were profitable.

The method King and Boucher devised for convincing FOF that its natural resource investments were demonstrating quick growth (thereby promoting additional purchases by FOF that were extremely lucrative for KRC) was as simple as it was fraudulent. King and Boucher arranged for sales of small percentages of certain natural resource properties at prices considerably higher than those at which FOF had purchased the properties from KRC. The high sale price was then used as a basis to upwardly revalue the remaining portion of these properties, which increase had a substantial effect on the year-end performance figures for the entire "natural resources" fund. What was not apparent, however, was that these sales—which the defendants falsely represented to be arms-length bona-fide transactions—were in fact shams, riddled with secret inducements, guarantees and other circumstances that rendered them clearly incompetent for valuation purposes.

King's companies reaped more than $85 million in revenues from FOF in less than three years, while the fraudulent $100 million revaluation of arctic lands, which was at the heart of this case, resulted in a direct loss to FOF's shareholders of $28 million.

The proof of the defendants' guilt, which Judge Frankel concluded was "powerful to the point of near certainty," came primarily from witnesses involved in the sham transactions as well as from numerous documentary exhibits that supported their testimony.

B. King and Boucher Begin to Do Business with FOF's New Natural Resources Proprietary Fund

In early 1968, when the events in question began to unfold, King and Boucher were actively running their Denver-based public company, KRC, whose primary business was the sale of oil, gas and other natural resource interests. King also operated the privately held Colorado Corporation, which controlled a vast complex of other natural resource oriented companies, many doing business with KRC. (Tr. 386-395, 409).

In April 1968, King and Boucher made a presentation to FOF's Directors for the purpose of inducing FOF to purchase from KRC oil, gas and other natural resource interests as investments. FOF was managed through subsidiaries of Investors Overseas Services (IOS), whose President and Executive Vice President and General Counsel, Bernard Cornfeld and Edward Cowett, were also officers and directors of FOF. King told the FOF directors that "wholly independent of tax considerations, . . . diversified investment in oil, gas, mineral and natural resources properties could be extremely profitable." Following this presentation, "an investment in diversified natural resources properties was approved by the Directors on an experimental basis, with the initial $10 million allocation to be increased *only upon satisfactory performance having been achieved.*" (GX If; Tr. 89-101)* (emphasis added).

Former FOF Director Alan Conwill explained that "performance" was the basic standard used to determine

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* "Tr." refers to the trial transcript; "GX" refers to Government exhibits; "DX" refers to defense exhibits; "Br." refers to appellants' briefs on appeal; "App." refers to the Appendix.

the allocation of FOF's assets into or out of separate FOF "proprietary fund accounts," which had direct investment responsibility for FOF. FOF invested its assets through a number of these so-called "proprietary funds," and each proprietary fund had a manger whose investment funds would be increased or decreased depending solely on his performance relative to that of the other proprietary funds and other market indices. (Tr. 80-85, 101).

As a result of King's presentation, the natural resource investments were placed in a natural resources proprietary fund, which KRC ran just like the investment advisors of FOF's other proprietary accounts. (Tr. 1327). KRC, however, had a far greater incentive to "perform" well and thereby obtain additional investment funds because, unlike any other proprietary fund manager, KRC not only selected the investments, but, more important, it was on the other side of the transaction as the seller of properties to FOF, and made enormous profits on almost every sale. (Tr. 101-03, 1161-62, 3245-47; GX 38l, GX 48k, GX 2g). As Cowett later explained to KRC's chief counsel, Timothy Lowry, "if King Resources sold IOS oil and gas properties which didn't prove profitable [for FOF], we [KRC] would just be cutting our own throats because they [FOF] would just stop giving money." (Tr. 1389).

C. King's and Boucher's Misrepresentations About KRC's Performance Begin—The 10% Sale to Raff

With a $10 million commitment to purchase in hand from FOF and a craving for more, King promptly embarked on a program designed to assure FOF's directors that they were getting superior performance from their investments in natural resources. In August, 1968, at an FOF director's meeting in Geneva, King reported

that FOF's first expenditures of $1.5 million had already produced a potentially large oil field discovery which should yield a net operating profit to FOF of "between $12,000,000 and $20,000,000 on a discounted basis." (Tr. 104-08; GX 1g). Later evaluations by FOF's accountants based on independent engineering reports placed the value of this oil field at the somewhat reduced figure of $350,000. (Tr. 2008-12).

As 1968 drew to a close, the actual "performance" of FOF's natural resource fund was far from impressive, and it looked like the year end figures were destined to show an $800,000 decline in the value of FOF's investments. Recognizing that this unhappy prospect would put a halt to the flow of FOF dollars into KRC's coffers, King and Boucher arranged a quick year-end sale which effectively transformed the $800,000 loss into a $1.5 million gain in valuation over cost, insuring the illusion of successful performance. This transformation of loss into gain was accomplished by arranging a sale at an inflated price of 10% of certain oil, gas and uranium interests previously sold to FOF, and then revaluing FOF's remaining 90% interest on the basis of the 10% sale price. The 10% sale to a Seattle broker, Robert Raff, was essentially a sham and a precursor of still more dramatic frauds to come. (Tr. 2087-89; GX 20a).

Raff was indebted to King for $100,000 and depended on King for a substantial part of his brokerage business when he received a call from his benefactor in late November or early December, 1968. King asked if Raff would "do him a favor" by purchasing certain oil, gas and uranium properties at a cost of $440,000. King assured Raff that he would only have to make an $88,000 downpayment, after which Boucher would arrange to sell the uranium properties for a sufficient sum to cover the remaining obligation and repay Raff for the down-

payment. Boucher confirmed that the uranium could be sold expeditiously. When Raff queried King on the "legality" of the transaction, he was told "to rest easy" and signed the purchase contract on December 20, 1968. (Tr. 702-11; GX 4k, 4l(2), 4m(1)).

King subsequently requested Raff not to discuss the transaction "openly" with other people in KRC, and also mentioned that the transaction had been done "for obvious reasons," which Raff later concluded to be "valuation purposes of I.O.S." (Tr. 721, 717-18; GX 4l(2)). Although the defendants' inability to sell those valuable uranium interests caused them to renege on their promise to Raff, they did provide him with funds to meet his overdue liability to FOF in the form of a $155,000 prepaid commission of which Raff had only earned $10,000. (Tr. 740-42).

FOF's auditors, Arthur Andersen & Co., who reviewed the 1968 year-end valuation figures provided by Boucher, were never told of Raff's secret guarantee, and, accordingly, never challenged the transaction, which resulted in a revaluation of FOF's natural resource investment and boosted its reported value by approximately $2.3 million. (Tr. 2087-89, 2095-97; GX 20a).

D. Having Created the Illusion of High Performance, King and Boucher Receive a Virtual Blank Check for 1969 From FOF

Encouraged by the illusion of substantial performance in its natural resource fund, FOF gave the defendants a virtual blank check for 1969. As a result, by the end of that year, FOF had paid out, for natural resource interests, over $55 million dollars to KRC and King's Colorado Corporation. (GX 38m, 380).

The profits to KRC and King's Colorado Corporation, of course, were substantial. In 1968, FOF purchases constituted 36% of KRC's total sales of resource interests and related services, but that 36% produced 68% of KRC's gross profit on all such sales. In 1969, FOF contributed 64% of KRC's gross profit on the basis of purchases constituting 39% of such sales. As FOF's assets flowed at an ever increasing rate out of its New York bank accounts into KRC's Denver bank accounts, KRC managed to triple its net revenues in 1968 ($4 million to $12 million) and then double that in 1969 ($12 million to $25 million). (GX 2f, 2g, 38l, 38m, n, o, p). With this dramatic rise in revenues, the price of KRC's publically traded stock tripled and King's personal holdings appreciated more than $30 million. Sales of KRC stock in 1969 netted King more than a $9 million profit, while Boucher took in approximately $750,000. (Tr. 3256-58, 3819-21; GX 2aa, 38q).

E. The Second Manipulated 10% Sale Preserves the Image of High Performance

As 1969 progressed, the defendants began envisioning still greater profits from a newly proposed IOS natural resource fund that would funnel approximately $300 million per year into KR[illegible]s bank account. Once again, however, things were not as they seemed and the actual valuation figures for 1969, evidencing the performance of FOF's natural resource fund, were headed for a year-end loss. Struggling mightily to avoid the inevitable, King and Boucher masterminded still another year-end fraudulent 10% sale for valuation purposes. This sale, in December 1969, was similar, though not identical, to the 1968 transaction with Raff. The consequences of this second transaction, however, were to be far more serious. For on the basis of this sham 10% sale, FOF—deceived concerning the true nature of the transaction—upped the valuation of its share of oil and gas permits covering 22,000,000 acres in the Canadian Arctic, in

which KRC and FOF each owned a 50% interest, by more than $100 million.* It is the details of this scheme to revalue the arctic land to which we now turn. (Tr. 2097-2103, 3201-04, 3824; GX 20mm).

During 1969, both King and Boucher had advised FOF's directors that the 22,000,000 acres of arctic holdings had substantially appreciated in value. After King advised FOF director Conwill that the arctic interest could yield a $3 billion profit to FOF, Conwill discussed this with Cowett, who requested King and Boucher to arrange a sale of a minimum of 10% of the interest in order to ascertain the correct market value of the interest, essential for FOF's net asset value calculation. Although KRC's Calgary office, which had primary responsibility for the Arctic program, had been unable to sell any of this arctic interest at more than $5 per acre, King and Boucher expressed confidence to Cowett that they could dispose of whatever size interest the fund wished to sell at a price in the neighborhood of $15 per acre. (Tr. 2217-18, 112-17, 3323-26; GX 48b, 48c, 48e).

1. The unsuccessful attempt to convince Standard Oil to engage in a sham sale

In October, 1969, on behalf of FOF, KRC offered to acquire the assets of a Standard Oil of Indiana subsidiary called Midwest Oil on the condition that Standard would purchase a 25% interest in the Canadian arctic permits at $15 per acre. Standard rejected the offer for several reasons, including the fact that it did not want the acreage. Several weeks later, King met with J. E. Swearingen, Chairman of Standard Oil, in a hotel suite in Houston. (Tr. 2578-82).

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* As we discuss more fully at pp. 28-29, *infra*, this revaluation eventually caused a loss to FOF's shareholders of $28 million.

Although Swearingen was accompanied at this meeting by two associates, including Midwest's President, King asked Swearingen if he would meet with him and Boucher privately to discuss Midwest and the arctic islands matter. Swearingen rejected the suggestion and told King that he would meet with him alone or else have another associate present if Boucher was involved.

King opted to talk with Swearingen alone and the two men withdrew to an adjoining room. There, King told Swearingen "that he was very anxious to make a sale of some part of the acreage that he had in the Canadian Arctic before the end of 1969," and that Swearingen "should not be concerned about the obligations which were purported to be imposed by the letter of offer . . . that he [King] would work out some kind of a way to give us [Standard Oil] back under the table the equivalent of money that we assumed as an obligation if we accepted his offer." King indicated that this "under the table" repayment could be accomplished with $100 million a year he had coming from IOS. Swearingen quickly rejected King's offer, saying that Standard Oil would not work with him on that kind of basis. (Tr. 2583-85).

2. The unsuccessful attempts to convince Robert Gordon and Mike Halbouty to purchase an arctic interest

Undaunted, King subsequently attempted to sell an interest in the arctic to Robert Gordon, Vice President of Ashland Oil, for the same $15 per acre. King told Gordon that the purpose of the sale was to establish a value on the acreage for IOS, and he explained that "this IOS group has spent considerable money with King Resources and it was going to be a very valuable source

of funds for King Resources in the future. . . ." King also indicated "that through this connection with IOS that King Resources would continue to have large sums of money to spend and that he would continue to take deals with Ashland Oil," that is, purchase from Ashland interests in various oil and gas properties. (Tr. 1142-44). Shortly thereafter, Gordon reported back to King that Ashland was not interested in his proposal because (i) "the price was too high," and (ii) "a large part of the acreage was under water in the Arctic Islands" and would be impossible to develop. (Tr. 1147-48).

At about the same time that King was soliciting Gordon, Boucher advised FOF's accountants that Mike Halbouty, an independent oil man in Houston, was also a prospective purchaser of this arctic interest. (Tr. 2044, 2050). Halbouty, however was equally uninterested in investing in the arctic. (Tr. 3481).

3. King and Boucher turn to John Mecom

Finally, in the waning days of 1969, King and Boucher turned to John Mecom, Bennett King and Harry Trueblood to effect a 10% sale of the arctic properties. King's approach to Mecom, another independent oil man, was made through one of Mecom's old friends, Bob Hulsey, who was at that time working for King as a petroleum engineer. King asked Hulsey to see if he could interest Mecom in buying a piece of the arctic and sweetened the offer with a guarantee that if, after a given time, Mecom was unsatisfied with the interest, he could sell it back to King. (Tr. 817-23).

Hulsey called Mecom and relayed this offer, only to be told, "Well Bob, . . . I just don't have the money." (Tr. 825). (Although Mecom was a wealthy man in terms of assets, "he had a tremendous indebtedness

against all of his properties" and was essentially so illiquid that he had no funds to purchase the arctic or anything else.) Hulsey reported back to King that Mecom had no money. King, undeterred, promptly arranged for the President of one of his Colorado Corporation subsidiaries to determine whether Mecom could "earn the money" by performing some work for the King complex. (Tr. 829, 1012).

4. Mecom signs a contract for arctic permits

Just before Christmas, Boucher asked Hulsey to take the contract to Houston "and get Mecom to sign it." (Tr. 831). Before Hulsey left for Houston on December 23, Boucher explained that "the repurchase agreement" and the "agreement to provide work," which were not in the contract that Mecom was to sign, "would be handled with an additional agreement that would be provided at a later date." (Tr. 833-34).

When Hulsey arrived at Mecom's office on December 24, during an annual Christmas party, Mecom brought in his attorney, Neal Marriott, and asked Hulsey to explain "the purchase and the basic side agreement." (Tr. 837). Marriott was then told that Mecom "was not to have any personal liability," and "would not have to be out any money" because any payments that he had to make would be made out of the profits, [*i.e.*] the cash flow from his "rigs" which King's companies would employ, and "if Mr. Mecom didn't like the acreage, John King would take the acreage back. I don't think the word buy it back was used at that time, because Mr. Mecom wasn't paying anything." (Tr. 1010-15, 1023).

The contract that Hulsey presented for Mecom's signature that Christmas eve contained none of the guarantees, and, although "Hulsey was rather insistent that

they get it signed that day . . ., Mecom was almost as insistent that it did not cover the entire agreement and he wanted to wait until the entire agerement was incorporated into the one document before I would sign it." (Tr. 1010). After reading the contract, Marriott said that he too "would like the contract to include the other terms of the agreement, the repurchase and work provisions." Hulsey, however, discouraged any delay because of the difficulty of redrafting the contract by the end of the year. Finally, it was agreed that Hulsey would take the signed contract back to Denver, but would put it aside and not release it to KRC until Marriott received and approved a supplemental side-agreement incorporating the promised guarantees. (Tr. 1013, 839).

Boucher was not pleased when Hulsey informed him of this arrangement on Christmas eve. (Tr. 840). Nevertheless, Hulsey placed the signed Mecom contract in his desk for safe-keeping. Upon returning from an out-of-town trip on December 31, Hulsey discovered that the contract was missing and was told it had been given to Boucher's secretary. (Tr. 840-41, 880).

5. Mecom receives the written side-agreement

On January 2, 1970, Mecom's attorney, Marriott, called Hulsey to complain that he had not yet received the supplemental agreement. (Tr. 842). After speaking with Boucher, Hulsey advised Marriott that Tim Lowry, KRC's General Counsel, "was preparing the cross letter agreements which . . . fully set out the understanding." Lowry then called Marriott and said he hoped to get "approval of the letter on Monday, January 5th." (GX 6d). After discussions with King and Hulsey, Lowry sent Marriott a copy of a letter agreement, the original of which had been signed by King, together with a note indicating that Lowry would retain the signed "original"

in his "office vault.' ..ing told Lowry "he didn't want copies floating around." The supplemental letter agreement, produced at the trial from Marriott's files, imposed time limits on the guarantees. (Tr. 1400-06, 1016-24; GX 1).*

6. Mecom's downpayment is advanced by King's subsidiary corporation

Mecom's downpayment on his arctic contract of approximately $260,000 was due January 2, 1970. It had

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* The letter read as follows:

December 24, 1969

Mr. John W. Mecom, Sr.
P.O. Box 2566
Houston, Texas 77001
Dear Mr. Mecom:

This is to confirm my agreement with you in connection with your purchase from King Resources Company of approximately 347,883 net acres of oil and gas exploration permits in the Canadian Arctic Islands for $7.50 per acre plus $7.50 per acre in work obligations under the terms of an agreement with King Resources Company dated December 24, 1969.

I have agreed to provide sufficient net cash receipts to be paid to enable you to make all payments on your said contract with King Resources Company through payments due in October, 1971.

At any time after October 1971 up to December 31, 1971, I have also agreed that if you so request and assign to me your interest to said permits, I will assume and pay and hold you harmless from all obligation to pay all amounts due King Resources under said contract subsequent to October, 1971. Provided that if, prior to October 1971, you are afforded an opportunity to sell your interests at a price in excess of your costs, my further obligations hereunder shall cease.

This letter will be held for our mutual account by Timothy G. Lowery of Peterson, Lowry, Rall Barber & Ross of Chicago, Illinois.

Yours very truly,

not been paid as of January 21, when FOF's auditors had only a few days left in which to clear the arctic transaction for revaluation purposes. On being reminded that Mecom had not been provided any funds with which to make the payment, Boucher requested Hulsey to ask Stan Hallman, Treasurer of King's Colorado Corporation, to forward the money to Mecom through a subsidiary of the Colorado Corporation. With King's authorization, Hallman told George Hardin, President of the subsidiary, that Mecom was to be immediately paid $275,000, and on January 22, 1970, arrangements were made for a wire transfer of funds from Colorado to the subsidiary to Mecom. (Tr. 844-45, 1487-88, 2068-69; DX PP). That same day, Marriott picked up the check from Hardin and gave it to Mecom's treasurer with instructions "to deposit it" and, with the proceeds, "give a check to King Resources to cover the initial payment [for the arctic properties]." (Tr. 1027-28). Mecom's treasurer did as instructed and the $260,000 downpayment was sent to KRC. (Tr. 935).*

7. Mecom defaults

Mecom never received the promised drilling business in the arctic and made no further payments on this purported $5 million financial obligation to purchase arctic

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* In April, 1970, the Mecom advance was shifted from Colorado's books to the books of Hardin's subsidiary, and Hardin's company then paid Colorado Corporation $275,000. Although Hardin claimed that at some point he anticipated using one of Mecom's rigs or acquiring some of his properties in return for this $275,000, there was no such contract or oral arrangement at the time the money was advanced, there was no journal voucher explanation of the purpose of the payment and, in fact, Mecom never provided Hardin with properties or rigs for that money. After June, Hardin made repeated attempts to force Colorado Corporation to repay the $275,000, but he never once sought the funds from Mecom. (Tr. 1487-1505).

properties. In December, 1970, Mecom's financial problems forced him to file a bankruptcy petition, and several months later Marriott commenced efforts to negate the entire transaction by calling KRC. When Boucher was unavailable to take Marriott's call, Marriott was connected with Dr. Arman Frederickson, a geologist who was also an officer and director of KRC. Marriott explained that he wanted to assign the Mecom arctic contract back to KRC as soon as possible in order to avoid laying the facts before the bankruptcy court, "because it would be very embarrassing for both Mecom and JMK [King]." (Tr. 1032-35, 2399-2408). Dr. Frederickson, who had no knowledge of the secret side deal, asked to see the guarantee letter agreement, and Marriott sent him a copy, together with a cover letter spelling out the facts of the transaction. (GX 6h).

8. The cover up

After Dr. Frederickson received these documents, he consulted a KRC attorney named Fishman, who immediately advised him to show the documents to Boucher. The following morning, when Frederickson delivered a copy of the Mecom guarantee letter to Boucher, Boucher claimed "he didn't know anything about it." (Tr. 2417-18). Shortly thereafter, King called Marriott at his home, upset that Marriott had sent the letter to Frederickson. King told Marriott that the letter was apt to get King into difficulty, particularly since Frederickson was not a friend. King then asked Marriott to write a letter stating that the letter to Frederickson had been a mistake. Marriott agreed, provided Mecom was released from his arctic contractual liabilities. King referred Marriott to one of his lawyers to work out the details. (Tr. 1036-44).

In May, 1971, an arrangement was worked out whereby Kings' Colorado Corporation (which had a bankruptcy

petition filed against it the previous month) assumed all of Mecom's liabilities under the arctic contract and also released Mecom from any and all claims relating to the $275,000 downpayment. In return and as a "prerequisite to the consummation" of the transaction, Marriott furnished a letter to King's lawyer falsely stating that the first letter he wrote to Dr. Frederickson had been an error. Colorado Corporation never made any of the payments required under Mecom's arctic contract. (Tr. 1038, 1043, 1046-51, 1054-57, 1272).

9. The Consolidated Oil and Gas Co. sale

Mecom's arctic contract covered almost one-third of the 10% interest which had to be sold to justify the 1969 revaluation of all of FOF's arctic properties. Harry Trueblood, John King's friend and neighbor and also the Chairman and Chief Executive Officer of Consolidated Oil and Gas Co. (COG), committed his company for almost two-thirds of the requisite 10%. Although COG had been located in Denver together with KRC since 1960, nine years elapsed during which COG neither purchased from nor sold to KRC any oil or gas interests. That pattern changed abruptly when King's need to sell the arctic prompted several curious transactions between the companies. (Tr. 1590-96, 1643-44, 2468).

In the Fall of 1969, Boucher and Trueblood had a few general discussions about KRC's arctic interest. Trueblood then consulted COG's president, William Booth, about the advisability of an arctic investment. Having some previous experience in the Canadian arctic, Booth advised that COG's money "would be better spent" by purchasing an arctic interest from the Pan Arctic group of companies, which had done more exploration work than KRC and whose properties were primarily on land

and therefore more valuable than KRC's acreage (which was 80-90% in water). (Tr. 1742-45, 1856-57, 3006, 3250).

A subsequent effort to acquire a Pan Arctic interest proved unsuccessful, and conversations between Trueblood and Boucher about the arctic resumed. Shortly before December 19, when Trueblood was scheduled to take a Christmas vacation in Hawaii, Boucher proposed that Trueblood acquire a $10 million dollar arctic interest at $15 per acre. Trueblood responded that he would take a look at the proposal when he returned. He then departed for Hawaii. (Tr. 1609-11, 1927-30).

Shortly after Trueblood arrived in Hawaii, the phone rang. John King pressed his old friend Trueblood "to close the transaction prior to December 31, 1969" for "tax" reasons. Trueblood replied that he was not prepared to commit himself that quickly and that, in any event, he only wanted to participate to the extent of $5 million, not $10 million. (Tr. 1612). King offered Trueblood an easy payment plan with installment payments over seven years, and suggested that the two companies could jointly promote the acreage to third parties, thereby reducing the future work obligations which constituted half of the purchase price.

Trueblood acquiesced and telephoned Booth just before Christmas with instructions to execute the deal on COG's behalf. (Tr. 1933, 1617-18). However, before the contract was signed, COG's General Counsel, Maurice Reidy, called to advise Trueblood that he "just couldn't allow us to purchase this interest" for several reasons, including the fact that the seller was IOS. Trueblood accepted the advice and told Reidy to "[t]ell Boucher the deal's off." (Tr. 1619-20).

On Christmas eve, John King was back on the telephone assuring Trueblood that he could buy his arctic interest from KRC instead of IOS * and further promising to provide financing for COG's downpayment. (Tr. 1621-25). Trueblood agreed, and the contract was signed. Pursuant to King's promise, Boucher arranged for a bank to extend a $600,000 loan to COG from which COG's downpayment was made. (The bank was owned by a KRC director, and, at King's direction, the bank received a $1 million deposit from KRC on December 31, as an accommodation to boost its year end deposit figures.) (Tr. 1621-22, 2942, 3700).

Trueblood, who the Court recognized to be a hostile witness, denied receiving any buy-back promises or other guarantees in those private telephone conversations with King. (Tr. 1646-47, 1711, 1729). The evidence proved the contrary.

In or about April, 1969, COG had acquired certain oil and gas interests in an area on the Alaskan peninsula called Bristol Bay. Thereafter, COG attempted to sell a portion of these interests to other oil companies without success. Thus, in August 1969, Harry Cooper, the manager of KRC's Western Division, which included Alaska, rejected a broker's offer to purchase an interest in the Bristol Bay Basin, and in October, 1969, Cooper, on behalf of KRC, turned down a direct offer from COG on the Bristol Bay prospect. (Tr. 1645-48, 1656-57, 1967-72; GX 15g, 16a, 16b, 16c).

Despite this history, Boucher in early 1970—after COG entered into the agreement to purchase a share of the arctic properties—arranged for KRC to purchase a 50%

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* At the eleventh hour, all the arctic sales were structured so that KRC sold a portion of its undivided arctic interest to the purchasers and then purchased from FOF 10% of its arctic interest at the $15 per acre price. (Tr. 2052-54).

interest in COG's Bristol Bay properties at prices far above market value, thereby providing COG with a handsome profit.* The Bristol Bay purchase contract, signed by Boucher, was dated February 25, 1970. KRC's Bristol Bay expert, Harry Cooper, was asked by Boucher to review these properties on March 2. Cooper told Dr. Frederickson that he considered Bristol Bay to be "moose pacture" or worthless acreage and "was very upset that after he [Cooper] had turned down the deal, the deal had gone through [via Boucher] . . ." Cooper, a good friend of Boucher's, testified that he reported back to Boucher that the area had potential, that he never discussed whether it was worth the price, and that he had absolutely no recollection of making any complaints about Boucher's decision to purchase Bristol Bay. (Tr. 1645-50, 1656, 1972-78, 2425; GX 15e).

In disavowing any connection between COG's arctic purchase from KRC and its subsequent sale to KRC of the Bristol Bay properties, Trueblood stoutly denied any recollection of mentioning Bristol Bay in his December, 1969 conversations with Boucher about the arctic. He also denied any personal involvement in the Bristol Bay negotiations with KRC. On both points, Trueblood was flatly contradicted by COG's president, William Booth. In addition, a handwritten note from Trueblood to Boucher concerning COG's Bristol Bay offer clearly disproved his claim of non-involvement. (Tr. 1645, 1648-49, 1931-32, 1936-37, 1659-64; GX 15f).

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* COG's Bristol Bay interest in "first priorities" had been acquired for $2 per acre and had been unsuccessfully offered for sale at $2.50 per acre in 1969 and $3 per acre in January, 1970. The very next month, KRC agreed to pay $5 per acre for these same "first priorities." Similarly, COG's Bristol Bay "leases," which had been acquired for $5 per acre, were sold to KRC for three times that price, $15 per acre. Just the preceding month, an Alaskan Petroleum Publication reported that sales of leases in the Bristol Bay area were "expected to bring in an average of $5/an acre." (Tr. 1645-50, 1656; GX 15e, 15g, 15f).

The real beauty and brilliance of the defendants' scheme were revealed in its next step. Within one month of the February 25, 1970 COG sale of Bristol Bay properties to KRC, KRC sold a 50% interest in those same Bristol Bay properties to FOF at a 20% gross profit. (GX 38l).

The second in what undoubtedly would have been a series of profitable sales by COG to KRC was under negotiation between Trueblood and Boucher in May, 1970. However, just about that time KRC began encountering severe financial problems, and this transaction was never consummated. (Tr. 1664-67; GX 15l). By this point, FOF was questioning its entire natural resource investment with KRC and it was unlikely that King could turn around and resell the interest to FOF. (Tr. 172-73, 198-201).

Another carefully concealed facet of COG's arctic transaction was the surreptitious financing by the King complex of COG's second arctic payment. In January, 1970, Dave Kerr, President of another Colorado Corporation subsidiary called Regency Management, advised Trueblood of the availabilty of financing from the State of Ohio. Kerr, who had never previously offered or been solicited to find financing for Trueblood, arranged to have COG borrow $2 million from the State of Ohio with the understanding that it would immediately be reloaned to Regency. Although the notes evidencing the reloan (and guaranteed by Colorado Corporation) reflected one and two year terms, Trueblood testified that the loans were subject to a one day call because he had earmarked these funds for the arctic obligations. In May, 1970, when King and Boucher began pushing for Consolidated's second payment on the arctic contract, Trueblood indicated that he would pay as soon as Regency repaid the $2 million. (Tr. 1667-75, 1679-93, 1706-07; GX 15n, 15o). King's Colorado Corporation then advanced the necessary

funds for Regency's repayment to COG, which monies, not surprisingly, in turn were used to pay KRC the second installment on the arctic contract. (Tr. 2463-66, 1704-05).

For reasons which he could not explain at trial, Trueblood deliberately lied to officials of the American Stock Exchange when they questioned him in May, 1970 about these State of Ohio loans, and gave false testimony to hide the fact that Regency had initiated those loan transactions and received $2 million of the proceeds in "reloans" from COG. At the same proceeding, Trueblood also lied to conceal the fact that the bank loan arranged by Boucher was the source of the arctic downpayment. (Tr. 1707-10, 1850-[illegible]2-74).

At about this same time, in an unguarded moment, Trueblood revealed what became obvious at trial (though Trueblood continued to deny it), *i.e.*, that the arctic sale was riddled with side-arrangements that made it an utter sham In May, 1970, when the arctic sales were being criticized in the press, Trueblood told a Wall Street Journal reporter that COG "could turn the acreage back to King Resources today if it wished cancelling all further payments." (Tr. 2570-72; DX QQ) The reporter understood Trueblood to mean that this proviso was part of the agreement with King. (Tr. 2576).*

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* When Trueblood's statement was reported in the next day's Wall Street Journal and FOF's auditors questioned him about it, Trueblood did not deny making the statement, but suggested instead that it had been "taken out of context" and that "the reporter had tried to lead him into supporting the rigged deal concept by suggesting that Consolidated might be able to walk away from the deal." (Tr. 1809-11, 1876; DX II). At the trial, Trueblood was unable to explain how that statement could have been taken out of context. He also acknowledged that because of his "respect for Jim Tanner" [the reporter], whom he described as "one of the few professional reporters left in the world," he must have made a statement somewhat similar to what was reported. (Tr. 1730-31, 1876).

10. COG moves for recission

Shortly after telling the Wall Street Journal that he could cancel "all further payments" under the arctic contract, Trueblood made good on his word and unilaterally ceased making the required payments, although more than $8 million was still owing under the contract. In early 1971, COG filed a lawsuit against KRC seeking either $26 million in damages or recission of the contract. (Tr. 1732-35).

Although Trueblood claimed at trial that the price COG agreed to pay for the arctic was "reasonable", Boucher, also at an unguarded moment, revealed his own awareness that the price was so inflated as to be "ridiculous." During a tape-recorded KRC Directors meeting in January, 1971, the directors were discussing the advisability of accepting a settlement to avoid COG's lawsuit. Neil MacKenzie, the Manager of KRC's Calgary office and their principal arctic expert, stated that, in his opinion, "Consolidated Oil and Gas entered into the Arctic transaction without any kind of proper management assessment of the value of that deal." MacKenzie went on to say that "on any inspection of that deal that Consolidated entered into, that Board of Directors has got to be subject to enormous shareholders' scrutiny, if I was a shareholder, at that price, considering going prices." At that point, Dr. Frederickson interrupted: "You say the price was too high, is that what you're saying?" To which MacKenzie replied, "It was ridiculous." Although, Boucher responded shortly thereafter to another comment by MacKenzie, he in no way challenged MacKenzie's pungent observation that Consolidated's $15 per acre price was "ridiculous." (Tr. 3967-68, 3970-75, 1781, 1640).

11. The Bennett King sale

When it appeared that the Mecom and COG sales would not quite add up to the 10% needed for FOF's

revaluation, King and Boucher located a third buyer who was close at hand. Bennett King, unrelated to John King, was a public relations man hired by John King in 1965. (Tr. 1155-60). In October, 1969, Bennett King, together with a wealthy friend, Edgar Greenbaum, had formed a partnership called Lakeshore Associates to invest money in "various venture capital situations" involving high technology companies. (Tr. 1175-76, 1245-46).

In December, 1969, Boucher suggested that Lakeshore might want to acquire a $2.6 million interest in FOF's arctic properties. Without any knowledge of petroleum engineering or geology, and without inquiring about the market value of the arctic properties, Bennett King committed Lakeshore Associates to a contract on December 30 at the $15 per acre price. (Tr. 1179-85).

That same day, John King agreed to loan Lakeshore Associates $1 million. Although Bennett King denied any connection between his arctic purchase and this allegedly coincidental $1 million loan, he did concede that, without the loan, Lakeshore would not have had sufficient funds to meet its pre-existing commitments and still pay the 5% downpayment required under the arctic contract. (Tr. 1187-94).

Moreover, in January, 1970, of approximately fifteen individuals solicited, John King became the first and only limited partner of Lakeshore Associates when he made a capital contribution of $500,000. Although Lakeshore then reduced the $1 million demand loan to King to $[illegible]0,000, that loan was still owed and uncalled six years later when Bennett King testified. (Tr. 1194-1203).

Lakeshore failed to meet its June, 1970 installment, as well as all further payments on the arctic contract. In January, 1971, Lakeshore advised KRC that it in-

tended to seek recission of the arctic contract. (Tr. 1204-08).*

12. John King's purchase

Possibly as an inducement to others, John King also purchased an arctic interest on December 31, and, after making the downpayment, his true interest in the arctic was reflected by his failure to make any further payments required under the contract. (Tr. 2977, 3216, 3573, 3677).

F. The Scheme Reaches Fruition

The short-run effect of King's and Boucher's machinations was precisely what they anticipated. Based on the $15 per acre price received for the sales of 10% of the arctic properties to Mecom, COG and Bennett King, revaluation of the remaining 90% of the arctic properties was approved by FOF's Board of Directors. This had the effect of transforming what would have been recorded as a loss of more than $10 million to a paper gain of more than $100 million. (Tr. 2097-99, 2232, 2521; GX 20mm). Of course, before this transformation was finally accomplished, FOF's auditors had to be deceived into believing that the arctic sales were on the up-and-up, because they were charged with reviewing the sales to insure that

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* Several months later, at a KRC directors meeting, "Dr. Frederickson inquired as to whether the sales to Lakeshore Associates, John Mecom and Consolidated Oil and Gas were arms length contracts. . . . Bennett King stated that he was not sure they were arms length and if the Company took Lakeshore Associates to Court, he would attempt to prove it." Bennett King testified that in this connection the State of Ohio loans which "passed through" Consolidated to Colorado Corporation's subsidiary "seemed very questionable." (Tr. 1209-13; GX 8s).

they met the criteria necessary to substantiate the monumental increase in value of the fund's recorded assets.* The primary criteria was that the sale should be "at arms length, . . . truly a sale and not just in substance an option." One of FOF's auditors explained that an "arms length transaction is one where the purchaser assumes not only the benefits of the property but all of the risks, and, in effect, it is a transaction made on a no-strings-attached basis." (Tr. 2039-40, 2101, 2213-14).

The auditors prepared a special representation letter for King and Boucher to sign which specifically focused on their "knowledge of any repurchase commitments, guarantees or other contingencies" relating to the arctic sales. The letter specifically represented that to the best of the defendants' knowledge and belief there were no arrangements through which King or his companies "have committed to acquire any of the interest sold or have guaranteed in any way the economic results of the transactions to the purchasers." (Tr. 2066-68; GX 20u).

At first King tried to avoid signing the letter. When William Coffey, the KRC Treasurer, told King that Arthur Andersen was expecting the letter to be signed, King asked why some other officer could not sign it. Coffey replied that Arthur Andersen specifically wanted King to sign it, and King expressed his displeasure. When Coffey, who knew nothig of the side deals and guarantees on the arctic sales, then told King, "If its not true don't sign it," King read the letter and signed it. (Tr. 2875,

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* For purposes of this determination, the auditors disregarded the Lake Shore transaction—even though they were unaware of John King's role as a hidden angel in that purchase—because of Bennett King's position with KRC. Accordingly, the auditors determination of the bona fides of the arctic sales was based only on the Mecom and COG transactions. (Tr. 2102-03).

2863-65; GX 20u). Boucher, too, was reluctant to sign off on that portion of the letter relating to Mecom. At the time, he attributed this reluctance to a concern that by signing the letter "he would be restricting the company or Mr. King from future dealings with Mecom." (Tr. 2234-35). But Boucher also signed.

On January 24, 1970, one day after signing the false representation letter and two days after Mecom was sent the $275,000 for his downpayment, Boucher was questioned by the Arthur Andersen partner in charge of the FOF audit, G D. Hubbard. Hubbard asked him specifically if the source of the downpayments was in any way related to a transaction with any of King's companies. Boucher categorically said "no." (Tr. 2234-35; GX 22j). A few days later, Hubbard also questioned King concerning whether he had "bankrolled Mecom's acquisition of his arctic interest." King told Hubbard that this was "not the case" and further stated that, with respect to other transactions he or his companie might have with Mecom, "there was no 'I will do this if you will do that' relationship with the Arctic Island transaction." (Tr. 3753-58; GX 22k).*

In mid-1970, growing newspaper criticism of the arctic revaluation caused FOF to seek an independent appraisal of their arctic investment. Shortly thereafter, a Canadian consulting firm advised FOF director Conwill that as of December, 1969, the arctic interest was worth

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* In May, when Trueblood told the *Wall Street Journal* that he could walk away from his arctic obligations at any time, the auditors required King and Boucher to sign a second representation letter in which both men again falsely denied any knowledge of "repurchase commitments or other guarantees" involving the arctic sales. (Tr. 2077-82; GX 20ii).

approximately $3 per acre. King and Boucher countered with an internal KRC study supporting the $15 per acre value. This substantial discrepancy in value caused the FOF Board of Directors to authorize an investigation of the natural resources account by Pierre Rinfret, a consulting economist. Rinfret flew to Denver and was falsely assured by King that the Mecom and COG transactions were arms-length bona fide sales. (Tr. 172-81, 195-96, 215-19, 228-38, 2373-75; GX 1w).

G. The Disastrous Effects of the Fraud on FOF's Shareholders

In the early months of 1970, FOF shareholders began to redeem their shares in massive quantities. The redemptions, caused in part by internal financial problems at IOS, resulted in an alarming reduction of FOF's liquid assets. This problem was severely compounded by FOF's inability to sell any of its natural resource interests, which constituted a substantial percentage of FOF's total assets.* (Tr. 154-57, 164-69, 230-32).

The arctic revaluation in late December, 1969, which had increased the recorded value of FOF's total assets by more than 10%, resulted in a false inflation of the net asset value** of each FOF share by $2.58. During

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* In July, 1970, FOF formally advised Boucher that the fund would not invest further monies in natural resources without prior Board approval. (Tr. 235-36; GX 1s).

** Net asset value represents the total market value of all of the mutual fund's assets, less its liabilities, divided by the number of outstanding shares. As with any open-end mutual fund, FOF's net asset value was calculated on a daily basis to determine the price at which investors could buy or sell (redeem) shares in the fund. (Tr. 77-79).

the first seven months of 1970, as FOF was experiencing massive redemptions, this fraudulent inflation depleted FOR of $2.58 on every share redeemed. Over the seven month period, this added up to a staggering $18 million loss for FOF's 150,000 shareholders. Damage from the fraudulent arctic revaluation increased to $28 million when FOF paid an IOS subsidiary its standard 10% performance fee based on the $100 million appreciation in value of the arctic interest.* (Tr. 2514-23, 167-70, 4259-60; GX 27b, 27b(1)-b(7)).

The Defense Case

King and Boucher both testified at length on their own behalf. Flatly contradicting numerous Government witnesses, both defendants protested that there were no secret side deals, repurchase agreements or other guarantees that made any of their valuation sale transactions other than arms-length bona fide sales. In essence, King and Boucher maintained that their arctic representation letters to Arthur Andersen were true in every respect. (Tr. 2948-49, 2956-57, 3557-58). The jury's guilty verdict on all counts, of course, resolved the credibility issues against the defendant and was confirmed by Judge Frankel's post-trial finding that "beyond a reasonable doubt, . . . the defendants swore falsely at key junctures in their testimony." (App. 29).

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* The damage done by King and Boucher was not yet at an end. In early August, 1970, with large redemptions continuing, FOF's liquidity crisis forced it to spin-off the illiquid natural resources assets, including the arctic properties, into a separate closed corporation which did not offer the redemption feature available to FOF shareholders. Prior to this spin-off, the net asset value at which an FOF share could be redeemed was approximately $18.47. After the spin-off, a shareholder was stuck with an FOF share redeemable at $7.44 and a share of the new closed corporation, Global Natural Resources Properties, Ltd., whose stock eventually commenced trading on an over-the-counter market in Europe at $2 to $3 per share. (Tr. 246-50).

A. The Raff Transaction

Exhibiting a remarkably selective memory, neither King nor Boucher could recall any personal involvement in Raff's 1968 year-end purchase of oil and uranium properties from FOF, but both defendants stoutly denied that Raff had been given any guarantees in connection with that transaction. Indeed, King even disclaimed knowing that the sale was used to increase substantially the alue of FOF's remaining 90% interest. When confronted with Raff's 1970 and 1971 letters expressly complaining about the unkept promise "that we [Raff] were to invest only $80,000 [the downpayment] and then the uranium was to be sold to recover our portion of the investment," the defendants were unable to explain their failure at that point to disclaim any such promise. (Tr. 2928-29, 3074-76, 3422-26, 3630-37; GX 4k, 4m(1), 4m(2)).

King and Boucher both testified at length about their continuing belief in the enormous value of the Canadian arctic oil and gas permits. King acknowledged telling FOF director Conwill that FOF's 50% interest had a potential value of $3 billion. (Tr. 2902-23, 3440-53).

B. The Meeting With Swearingen

King testified that at some point FOF requested KRC's help in selling a portion of their arctic interest, and that led to the proposal which Standard Oil turned down. Although King admitted that he met privately with Swearingen, he claimed that the subject of their closed door one-on-one discussion concerned a mutual problem in the Gulf of Suez and had nothing to do with the arctic. King expressly denied offering Swearingen any "under the table deal" or mentioning the $100 million per year he anticipated receiving from IOS. (Tr. 3458-74).

Following his meeting with Swearingen, King solicited Gordon of Ashland, but "perhaps the price was not right for them." King also recalled talking to Mike Halbouty, a major independent oil man, but, King claims, Halbouty's "relative size . . . precluded him from consideration of the interest." (Tr. 3475-84).

C. The COG Sale

According to King, his only involvement in the sale to COG was one phone call to Trueblood in Hawaii in late December to assure Trueblood that COG would be purchasing its arctic interest directly from KRC. King indicated that, because of the short money supply in the country, he probably told Trueblood "that we would have some connections that he might, if he wished to borrow some funds, he might be able to obtain some assistance in that regard." (Tr. 3489-92). Boucher testified that he discussed the arctic prospect with Trueblood, and, although financing for COG was never guaranteed, Boucher did recall arranging the loan for COG from a Tulsa bank. (Tr. 2942-43).

Both King and Boucher expressly denied promising Trueblood any buy-back or any other guarantee and claimed no knowledge of any connection between KRC's purchase of Bristol Bay and the arctic sale. (Tr. 2945, 2956-57, 3493-94, 3557-58). Contrary to Booth's testimony, Boucher claimed he had no recollection of discussing Bristol Bay during the arctic negotiations. (Tr. 2943). Boucher also testified that Harry Cooper reported to him that COG's Bristol Bay prospect was a "good program," although for some reason he was never told that Cooper had personally rejected Bristol Bay prospects on two separate occasions. Even though the Bristol Bay contract was dated one week before Boucher sent Cooper to review the prospect, Boucher contended

that he did not sign the contract until after Cooper's review. (Tr. 3179-84). Boucher also denied that Trueblood ever mentioned COG's "reloan" to the King-controlled Regency Corporation at or about the time Boucher asked Trueblood for the second installment on his arctic contract, although he had given contrary testimony, under oath, to the SEC in August, 1970. (Tr. 3184-87).

At first, Boucher could not recall MacKenzie telling him that COG's arctic price was so high as to be "ridiculous." (Tr. 3272-75). After reviewing a tape recording of the conversation, Boucher testified that he failed to take issue with MacKenzie's statement because it was made during a lengthy discussion with other FOF directors about a proposed settlement with COG on the arctic and he "wasn't concentrating on this particular aspect at that time." (Tr. 3966-74).

D. The Bennett King (Lakeshore) Sale

King testified that there was no connection between Lakeshore's arctic purchase on December 30, and the $1 million loan he made to Lakeshore on December 30. King also denied that he ever discussed with Bennett King the fact that the $1 million loan would be used or even be helpful in paying for the arctic investment.

The falsity of this claim was exposed on cross-examination when it was revealed that the $1 million King loaned to Lakeshore was actually a reloan of two thirds of $1.5 million King had borrowed that same day from an English bank. In his English bank loan agreement, King represented that the purpose of his borrowing was to "repay outstanding loans and to finance participation in oil drilling ventures." The arctic was Lakeshore's only "oil drilling venture."

When confronted with this loan document at trial, King immediately claimed that he had never seen it before and that he doubted it was a true copy of the actual loan agreement. Bennett King, however, had previously identified the document as his file copy of the English bank loan agreement on which the Lakeshore loan was based. (Tr. 1187-89, 3573-79; GX 8g).

E. The Mecom Sale

The King-Boucher version of the Mecom transaction was totally inconsistent with the testimony of Hulsey, Mecom, Marriott and Lowry, and both defendants expressly denied any knowledge of the letter agreement containing the buy-back and other guarantees which Lowry sent to Mecom's lawyer.

According to King, he called Mecom in early December, 1969, and inquired if he wanted to purchase an arctic interest from IOS. King advised Mecom that he was buying an interest for himself, and, after some discussion about the nature of the interest and its cost, Mecom committed himself to the purchase. Although there was some general discussion about the possibility of using Mecom's rigs, there was, King alleged, absolutely no promise to supply Mecom with work or monetary payments to help him meet the arctic obligation. Nor, according to King, did Mecom mention being short of cash. In fact, King testified that Mecom wanted to buy a bigger interest, but there was not enough available. (Tr. 3512-20).

King acknowledged sending Hardin to see Mecom but claimed that that was prompted by random conversation with Mecom "about the number of projects that he would like to drill." (Tr. 3522). King also professed a total lack

of recollection of ever being aware of the $275,000 paid to Mecom in January, although he conceded that Boucher would not have been able to transfer those funds without King's authority. (Tr. 3523, 3563).

Both King and Boucher flatly denied that they used Hulsey to initiate the arctic offer to Mecom or that Hulsey did anything more than act as a messenger who went to get Mecom's signature on the contract. Boucher testified that he never heard of any special conditions whereby Hulsey was to hold the contract in escrow until the side-guarantee agreement was sent to Marriott. He also disclaimed any responsibility for removing Mecom's signed contract from Hulsey's desk. (Tr. 3563, 2948-53).

Boucher conceded holding up the arctic drilling bid selection to permit Mecom to make a late submission; however, as Hulsey earlier testified, Mecom was dropped from consideration when Boucher received some information that Mecom's equipment was inadequate for the job. (Tr. 2959-61).

On February 10, 1970, KRC's arctic drilling business was awarded to Parker Brothers. According to King, that same day he received a call from Mecom, the substance of which he immediately dictated into a memorandum which was produced at trial. (Curiously, numerous other conversations between King and Mecom were not reduced to writing or at least not retained for trial.) King testified from the memorandum that Mecom complained that his bankers were "strongly objecting" to his arctic purchase, which they had learned of from "recent publicity," and this might endanger certain financial arrangements he was seeking. King allegedly responded that he might want to buy Mecom's interest after a year or two and, if not, would be willing to try to sell it to other interested parties who had already

contacted him. King offered to indicate this to Mecom's bankers, and it was left that Mecom's lawyer might send a draft agreement to Lowry.

King expressly denied that he was worried about having to let Mecom out of his arctic contract sooner than anticipated because of Mecom's anger about not getting the drilling business. King further denied that such a concern had prompted him to prepare the telephone call memorandum to make it look like any ensuing buy-back "hadn't been planned before that [false] representation letter of January 23rd." (Tr. 3765-79).

King's version of how his Colorado Corporation assumed Mecom's arctic obligation was patently incredible. King testified that Mecom called around March, 1971 "and said he had a problem because of the $275,000, the claim the Colorado Corporation had for that $275,000 and it was impeding him coming out of bankruptcy." (Tr. 3865). King replied that, to help Mecom satisfy that $275,000 problem, he agreed to take over Mecom's entire $5 million arctic obligation. In fact, the Colorado Corporation had never even filed a claim in Mecom's bankruptcy for the $275,000 or for any lesser sum. (Tr. 3864-68, 4103-04).

King flatly denied complaining to Mecom's attorney, Marriott that Marriott's letter to Dr. Frederickson was going to cause "trouble." Moreover, he denied any knowledge of the letter or of speaking with Marriott at all and could not explain how Marriott's handwritten notes of that phone call bore the King private home telephone number. (Tr. 3565-67; 6k).

Although Boucher conceded receiving Marriott's letter with the Mecom guarantee letter attached, he claimed that he never discussed it with King. Rather, he allegedly called Lowry, who allegedly said "there is noth-

ing for you to be concerned about," because Marriott "didn't understand the transaction." (Tr. 2978-80). Lowry denied that such a conversation ever took place. (Tr. 1455, 1475-76).

Boucher could not explain why he concealed Marriott's letter and the Mecom guarantee letter from FOF's accountants in June, 1971, when the accountants asked for a special representation letter in which Boucher falsely denied knowledge of how Mecom's downpayment was financed. (Tr. 3040-45).

The Government's Rebuttal Case

In rebuttal, the Government called several witnesses. Richard Farrell, Vice President of Standard Oil, produced his contemporaneous notes of the King-Swearingen meeting which clearly indicated, contrary to King's testimony, that the arctic proposal was the subject of their private meeting and the Suez matter was discussed by the larger group. (Tr. 4048-62; GX 42a, 42a1-3).

Charles Carwile, a Louisiana attorney who worked on Mecom's bankruptcy proceeding, testified that there was no claim filed against Mecom for $275,000 by the Colorado Corporation. (Tr. 4102-04).

Mecom's banker in 1970, A. G. Gueymard, refuted King's version of the February 10th phone call with Mecom by testifying that neither his bank, nor the other lenders in the group which had extended substantial loans to Mecom, made any objection to Mecom about his arctic contract. (Tr. 4087-92).

Finally, William White, a former business associate of King's testified, in contradiction to King, that in

April, 1970, at White's New York apartment, King stated he was trying to obtain financing for Trueblood. White further stated that the preceding January, King, who had disclaimed any knowledge of or involvement with the State of Ohio loans, had introduced him to one Ron Howard "with regard to the possibility that loan funds from the State of Ohio might be available." (Tr. 3713, 3495-96, 4075-82).

ARGUMENT

POINT I

The Trial Court's Exclusion of Documents Filed in Mecom's Bankruptcy Proceding Was Neither Improper Nor Prejudicial and Counsel Had Ample Opportunity to Cross-Examine on Those Documents.

King seeks to reverse his conviction on the ground that he was erroneously precluded from impeaching John Mecom with "prior inconsistent statements" when Judge Frankel excluded ten exhibits relating to Mecom's bankruptcy proceeding and allegedly restricted Mecom's cross-examination concerning those documents. The exhibits, most of which contained neither inconsistent statements nor statements by Mecom, and all of which contained vast amounts of irrelevant material, were properly excluded. Not only did the defense deliberately avoid cross-examining Mecom about these documents, but three of the ten exhibits, containing the essence of the alleged inconsistencies, were subsequently admitted and argued to the jury, rendering any claim of prejudice fanciful. In sum, the argument is entirely meritless.

John Mecom testified that his arctic contract with FOF was based on a separate side deal. Mecom, in return for a commitment to purchase the arctic properties,

was guaranteed (1) the opportunity to pay for the properties from the profits earned by drilling for King's companies and (2) the right to transfer his contractual obligations to purchase back to King. This testimony was fully corroborated by Hulsey, Marriott, Lowry and a host of documents, including King's guarantee letter.

At the very end of Mecom's cross-examination, King's counsel offered into evidence ten exhibits—documents aggregating more than 200 pages which had been filed in Mecom's bankruptcy proceeding initiated a year after the arctic transaction. When Mecom asked "what this has to do with my business with Mr. King?", Judge Frankel had the same question and suggested to defense counsel that, "If the defendant is going to put in this whole sheaf of bankruptcy papers I think it would help the jury and me to make clear their purpose and which parts of them are thought to be relevant to this case." (App. 1368-69). Without bothering to identify the relevant portions, King's counsel responded that the documents contained representations about Mecom's arctic contract which were inconsistent with Mecom's testimony about a side agreement.* (App. 1369). With that assurance, Judge Frankel

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* In a footnote on page 29 of his brief, King asserts that the relevant portions of the documents had been marked and were shown to the prosecutor. This assertion does not square with our recollection of the facts. The relevant portions of the documents were in no way brought to the prosecutor's attention. If they had been, defense counsel's apology to the Court at pages 982-83 of the transcript (App. 1391-92) would not have been necessary.

King also implies in the same footnote that the prosecution knew full well what portions of the 10 exhibits he wished to rely upon because, "[p]rior to trial, the prosecution had examined the full court file in Texas, and had obtained copies of many of the documents for itself." Suffice it to say that the documents subpoenaed in this case filled numerous file cabinets, and the Government had received no notice from counsel prior to Mecom's examination that these documents would be relied upon.

admitted all ten exhibits into evidence. King's attorney then sat down without asking Mecom a single question about anything in the more than two hundred pages he had just placed in evidence.

Having been precluded from a *voir dire* on these exhibits, the Government utilized redirect examination to establish that the ten exhibits contained a variety of schedules, letters, pleadings and other documents, none of which had been written or prepared by Mecom. Only three exhibits* even contained documents bearing his signature. When the Government moved to exclude all the documents, King's counsel requested and received a *voir dire*. Defense counsel again asked not a single question intended to establish what portions of this raft of papers were inconsistent with Mecom's testimony. Although counsel succeeded in obtaining an acknowledgement that Mecom read those documents which he had signed, Mecom firmly denied that the attorneys who prepared the bankruptcy documents had obtained the facts contained in the documents from him: "Not these papers, because these papers are lists of properties and debts and things that they [Mecom's attorneys] referred to my accountants and my books to get the facts of that." (App. 1389). After the conclusion of counsel's *voir dire*, which had not focused on *any* of the allegedly inconsistent statements, Judge Frankel excluded the documents, commenting:

> "You bring a three-inch sheaf of bankruptcy papers to the court, you put them in without asking this witness a single question about the allegedly interesting excerpted portions, you conclude your cross-examination, the only enlightenment that the jury gets about that thick sheaf of papers has to be supplied by the Government and redirect show-

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* DX U, W, AA. (App. 871, 936, 989).

ing the nature of the attention or the inattention the witness paid to these matters at that time, *failing in any of this examination to focus on what is supposed to be the issue before us*, and in that posture the Government's motion is granted." (Tr. 1392) (emphasis added).

King contends that exclusion of these documents constituted reversible error, because "[a]ll the documents were admissible for impeachment purposes as prior inconsistent statements." (King Br. at 38). The documents themselves definitively disprove this contention. Six of the ten exhibits are simply not statements by Mecom at all, but rather consist of letters, schedules and other documents prepared and signed by various attorneys, receivers and a referee in bankruptcy. (DX V, Y, X, Z, DD, CC). (App. 915, 947, 942, 951, 1083, 1068). Except for Exhibit CC—one of these six, which was admitted during the testimony of Marriott, who had signed and prepared documents contained therein—these exhibits were primarily concerned with matters totally unrelated to Mecom's arctic contract. To the extent that two of the four remaining exhibits contained any statements relevant to Mecom's arctic contract, these statements were perfectly consistent with Mecom's testimony and therefore not admissible for impeachment purposes * (DX AA, BB), and one of these two exhibits, containing sixty-two pages of schedules, was admitted without objection during the testimony of the bankruptcy attorney who prepared the schedules. (Tr. 4112; DX AA). The only two exhibits which could even arguably be said

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* One exhibit, consistent with Mecom's testimony, referred to the arctic leases as an interest which "was to be purchased by profit from drilling in the Alaska [Arctic]-North Slope area on leases controlled by King Resources. The drilling was not awarded to Mecom and negotiations are in progress for cancellation of the transaction." (App. 1015). In the other exhibit, Mecom adopts a statement by his lawyer that the King Resources

[Footnote continued on following page]

to contain prior inconsistent statements by Mecom total forty-eight pages, forty-five of which are devoid of any allegedly inconsistent statements. (DX U, W). One of these Exhibits (DX W) was eventually admitted in evidence, read to the jury, and referred to in defense summation. Two brief references in the other exhibit were at best cumulative. (App. 871).

Irrespective of all this, Judge Frankel's initial exclusion of these two exhibits, as part of the group of ten, based on a failure to "focus on what is supposed to be the issue," so that "nobody understands what these inconsistent things are that you are supposedly eliciting from this witness," was clearly proper. (App. 1372, 1404). Faced with a totally inadequate showing that more than two hundred pages of documents were brimming with inconsistent statements of Mecom as opposed to consistent or irrelevant statements of others, Judge Frankel correctly concluded that the documents' "modest potential relevance" was outweighed by the tendency they would have

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claim is among "three doubtful claims" which will not get paid with "other claims we recognize as being legitimate." (App. 1062-63). King argues that he intended to use this exhibit for a completely different purpose than the one he twice expressed to Judge Frankel below (App. 1369, 1391), that is, to show that "Mecom's liquidity was significantly better than he stated in his trial testimony when he claimed he did not have funds to enter into the Arctic contract." (King Br. at 27-28). Actually, this exhibit's "discussion of Mecom's liquidity situation" does not contradict his trial testimony at all. The statement that Mecom was forced to petition for bankruptcy "because of three improvident loans that had been made to the big banks and insurance companies *that required more cash than they* [Mecom and his companies] *had income* . . ." (emphasis added) and the further reference to the fact that "thus far in this proceeding there has been a negative cash flow . . ." are totally consistent with Mecom's testimony about his illiquidity in December, 1969. (App. 1063-65).

to confuse the trial issues and mislead the jury. (App. 1404).

The Court's ruling is fully supported by settled case law. Questions of the relevancy of proffered evidence are to be determined in the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of a clear abuse of that discretion. *Hamling* v. *United States*, 418 U.S. 87, 124-25 (1974); *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Similarly, the scope of cross-examination is a matter for the trial court's discretion. *Alford* v. *United States*, 282 U.S. 687, 694 (1931); *United States* v. *Green*, 523 F.2d 229, 237 (2d Cir. 1975), *cert. denied* 423 U.S. 1074 (1976); *United States* v. *Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). A trial judge's determination of the proper scope of cross-examination is to be treated with "great deference" by appellate courts, clear abuse of discretion being the appropriate test for reversible error. *United States* v. *Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). This is particularly true where it appears from the record that, notwithstanding the exclusion of individual items of evidence, the cross-examination has nonetheless been "full and searching," *United States* v. *Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), and where further questioning will sidetrack the trial by involving the court in collateral issues which may cause undue delay or confusion. *Hamling* v. *United States*, *supra*, 418 U.S. at 127.

Support for Judge Frankel's ruling can also be found in Rule 403 of the Federal Rules of Evidence, which states:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed

> by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The criteria of Rule 403 are plainly applicable to a determination of whether evidence of a prior inconsistent statement should be admitted. See 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[06], at 607-71 to 607-72 (1975). And in commenting on Rule 403, Judge Weinstein has specifically noted that "courts are reluctant to becloud the issues in the case at trial by admitting evidence relating to previous litigation involving the parties." 1 J. Weinstein and M. Berger, Weinstein's Evidence, *supra*, ¶ 402[04], at 403-04. Indeed, this package of bankruptcy documents was not unlike the "confused mass of papers" whose exclusion was upheld by this Court "because, in its disorganized form, it could only confuse the jury." *United States* v. *Rosenthal*, 470 F.2d 837, 843 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

"Having presented the court with a 'mixed bag' or potpourri, most of which was inadmissible . . . counsel owed a duty to court and opposing counsel to point out or segregate those portions which might properly be offered. . . ." *Trade Development Bank* v. *Continental Insurance Co.*, 469 F.2d 35, 44 (2d Cir. 1972). It is well established that "[i]f some evidence is admissible, and other evidence is inadmisible then the whole (if properly objected to) is inadmissible; it is for the proponent to sever the good from the bad." *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 286 F.2d 933, 939 (5th Cir.), *modified on other grounds*, 289 F.2d 355, *cert. denied*, 368 U.S. 833 (1961); see also *High Voltage Engineering Corp.* v. *Pierce*, 359 F.2d 33, 39 (10th Cir. 1966); 1 J. Wigmore, Evidence, § 17, at 320 (3d ed. 1947).

King correctly observes that, under Rule 613 of the Federal Rules of Evidence, defense counsel was not required to show the witness his prior statements before seeking their admission. (King Br. at 39). See also *United States* v. *Harvey*, Dkt. No. 76-1183, slip op. 6029, 6033-34 (2d Cir., Nov. 24, 1976). But this observation misses the point. Rule 613 does not provide license to counsel to ignore his responsibility to identify what, in a mass of documents, is believed to be (a) a statement of the witness and (b) a portion inconsistent with the witness' earlier testimony. Rule 613(b), after all, provides that "extrinsic evidence of a prior inconsistent statement by a witness is not admissible *unless the witness is afforded an opportunity to explain or deny*" the prior inconsistent statement. (Emphasis added). Confronted with more than two hundred pages of documents without any specification of any allegedly inconsistent statement, Mecom was simply not afforded a fair opportunity to explain or deny an inconsistency not previously identified.*

Defendant's further complaint that they were erroneously denied the right to cross-examine Mecom about his "contradictory prior statements" in the bankruptcy documents is highly misleading. (King Br. at 36). Both defense counsel had ample opportunity to cross-examine in this area and declined to do so. King's lawyer deliberately refrained from asking a single question about

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* Although King's counsel belatedly expressed a willingness to make "sub exhibits" of relevant portions, he never limited his offer to less than all ten documents in their entirety (App. 1391), and this offer came after King's counsel had twice been given an opportunity—on cross-examination and on *voir dire* during the Government's redirect—to identify the pertinent inconsistencies.

anything in the more than two-hundred pages of bankruptcy documents. He also did not ask anything about the bankruptcy itself, other than to adduce the names of Mecom's bankruptcy attorneys. King's insinuations that his cross-examination on these bankruptcy papers was unfairly curtailed by an impatient judge is an unfortunate canard. (King Br. at 29, 30, 32). In the first place, the voluminous bankruptcy records were in such a state of disarray that, on several occasions, counsel was forced to suspend his examination in order to mark and organize the exhibits. When this became apparent, Judge Frankel offered counsel a recess. After declining the offer, counsel's lack of organization produced further delay, and he apologized for not having "the documents better organized." (Tr. 961).* Secondly, and more important, King's counsel never intended to cross-examine in that area. This was apparent at the outset when he stated, "I don't think I will ask any questions about this [first bankruptcy exhibit] your honor. I just want the witness to identify these documents." (App. 1367). Later on he confirmed that "I did not feel that I wanted to question the witness at great length about something that obviously was prepared by his attorney but he swore to it. . . . I felt I would just put them in and then read those portions that I felt were relevant." (App. 1402).

Recognizing this inherent problem in his claim, King argues that his real need to cross-examine Mecom on the bankruptcy issue arose only after the redirect examination and, therefore, Judge Frankel's curtailment of re-cross examination at that point was prejudicial error. King ignores the fact, however, that, given an opportunity

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* These incidents find no mention in King's brief where he accuses Judge Frankel of having "hurried" him. (Br. at 29).

during the Government's redirect to conduct a *voir dire* on the admissibility of the documents, King failed to follow any of the lines of examination he now claims were so vital. Moreover, after the bankruptcy documents had been excluded and redirect examination on other subjects was completed, King's counsel sought "to ask a few questions with respect to the [bankruptcy] documents" because "[y]our honor pointed out that apparently their problem with going into evidence is the fact that there were not sufficient questions asked of the witness . . . I think your Honor is right, I should have brought out more from him . . . I would now like the opportunity to go back and do it through the witness. But I think they [bankruptcy documents] are highly relevant, your Honor, and I think it would be unfair to leave them [bankruptcy documents] out." (App. 1399, 1400, 1402-03). Obviously, *readmission of the documents into evidence* was counsel's principal goal, as opposed to the "substantive cross-examination" which he now seeks for the first time on appeal. (King Br. at 35).* Concluding that defense counsel had already had "every opportunity" to show the relevance of the documents without bringing out "what these inconsistent things are . . . [in any] useful intelligible way," and "having in mind that even as you put it now at most these [documents] are of modest potential relevance," Judge Frankel reaffirmed his ruling of exlusion. The ruling

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* Counsel's statement below as to what he wanted to "bring out through [Mecom]" did not include the imaginative areas of inquiry presented for the first time on page 31 of King's brief. And in any event, most of the material which King now claims he wanted to adduce on cross-examination (i) became available through the admission of three bankruptcy exhibits, (ii) was elicited from Marriott or Charles Carwile, Mecom's bankruptcy lawyer, or (iii) could have been elicited from Carwile, who was present at the proceeding transcribed in Exhibit BB.

was an appropriate exercise of the trial court's discretion.*

Defendant also mistakenly argues that he was precluded from calling Mecom as a defense witness and was thus "twice refused" the right to cross-examine Mecom with respect to his "redirect testimony denying involvement" with the bankruptcy documents. (King Br. at 33-34, 41). The record clearly shows (1) that King was in no way precluded from recalling Mecom, and (2) that his sole purpose for even contemplating recalling Mecom involved *readmission* of the bankruptcy documents as opposed to rebutting "the impression left by the . . . [redirect] questioning." (King Br. at 30-31).

As part of the defense case, King renewed his application to admit into evidence the only four bankruptcy exhibits which contained statements by Mecom. Noting that the documents were previously excluded "on the ground that defense counsel had not examined the witness in sufficient detail with respect to them," the defense offered to recall Mecom "[f]or the limited purpose of offering these documents. . . ." But, in the next breath, counsel argued that because of the expense involved "it should not be necessary to call Mr. Mecom as a witness" for that purpose and sought to persuade the Court that documents should be admitted without requiring Mecom to return. (App. 762-C, 762-G, 762-H). Judge Frankel denied the renewed application to admit these four exhibits "whether you call him [Mecom] or not," but,

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* This Court has held that a trial judge will not be found to have abused his discretionary control over cross-examination where, as here, "such impeachment should have been brought out on the initial cross-examination" or where certain "lines of inquiry were not pointed out at all to the trial judge." *United States* v. *Blackwood*, 456 F.2d 526, 529-30 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972); *United States* v. *Mahler*, 363 F.2d 673, 677-78 (2d Cir. 1966).

contrary to defendant's assertion, he in no way "ruled that Mecom could not be called as a defense witness." (App. 1325-26; King Br. at 33). King's true lack of interest in cross-examining Mecom became even more apparent when he *requested and obtained* a concession from the Government that he would not have to recall Mecom in connection with his final reoffer of one bankruptcy exhibit. (DX W; Tr. 4035, 4039). Although questioning "this talk of it [the exhibit] being flatly inconsistent," Judge Frankel nonetheless admitted the document.

The admission of this Exhibit (App. 936) precludes any claim of prejudice on appeal. King's basic contention is that he was deprived of the right to impeach Mecom's assertions of a side deal by showing that no such deal was referred to in bankruptcy documents which treated the arctic contract "as a legitimate binding contract." (App. 1369; King Br. at 26). When defense Exhibit W, a schedule of executory contracts, was admitted and read to the jury, it provided the fullest possible evidentiary foundation for this impeaching argument. The alleged inconsistency would not and could not have been advanced one step further if all two hundred pages of all ten exhibits had remained in evidence. To the extent that other bankruptcy documents referred to the arctic contract as if it were a binding contract devoid of side deals, they would only have been cumulative. (DX U, V, Y, Z, DD). Moreover, defense counsel's somewhat dramatic summation argument fully exploited the one exhibit by arguing that it constituted Mecom's true testimony "before the Government could get their hands on [him] . . ." and contained "[n]ot a whisper about any kind of buy back agreement." (Tr. 4382-83).

Furthermore, two other bankrupt exhibits were received in evidence and freely explored in cross-examina-

tion of the men who prepared them. One of those witnesses, Charles Carwile, was Mecom's bankruptcy lawyer, and information about Mecom's involvement in the preparation of the documents, Mecom's discussions about the arctic contract, or the relative importance of the arctic liability could have been easily elicited from him.

In short, the defendant was not prevented from establishing the allegedly impeaching inconsistencies, and his claim of prejudice is a hollow one.

POINT II

The Pre-indictment Delay Was Neither Purposeful Nor Prejudicial.

Citing principally the loss of FOF Director Edward Cowett as a key witness, defendants renew a claim, twice denied below, that they were unfairly prejudiced by pre-indictment delay which they allege was "tactically motivated." Absent any showing as to how Cowett could have helped the defense, and after a six week immersion in the facts of this case at trial, Judge Frankel properly rejected this identical claim when presented in even greater detail below. (App. 28-32).*

In *United States* v. *Marion*, 404 U.S. 307, 324-25 (1971), the Supreme Court held that the Due Process Clause of the Fifth Amendment protects a defendant against pre-indictment delay only if he can establish that the delay substantially prejudiced his right to a fair trial *and* resulted from prosecutorial misconduct designed to

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* Judge Frankel also denied defendants' pre-trial motion to dismiss on these grounds, concluding that it was "exceedingly improbable" that Cowett could have helped the defense. (App. 174-76).

harass or to gain some tactical advantage over him. *United States* v. *Schwartz*, 535 F.2d 160 (2d Cir. 1976); *United States* v. *Eucker*, 53[illegible] F.2d 249, 255 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 4, 1976).* Judge Frankel's post-trial ruling that "defendants show neither intentional delay for tactical advantage nor measurable prejudice" (App. 32), is an accurate reflection of the facts and should not be disturbed on appeal.

A. There Was No Deliberate and Tactically Motivated Delay

Primarily on the basis of information about the Mecom side deal provided by Dr. Frederickson to the Denver office of the SEC in the Spring of 1971,** de-

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* The issue of whether the *Marion* requirements are in the disjunctive or in the conjunctive has not been fully resolved by this Court, *United States* v. *Vispi*, Dkt. No. 76-1250, slip op. 513, 517 & n.4 (2d Cir., Nov. 15, 1976); *United States* v. *Finkelstein*, 526 F.2d 517, 525-26 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976), although it now seems plain that at least a showing of prejudice is essential to support a claim of unconstitutional delay. *United States* v. *Vispi*, *supra*. While the Government maintains that both logic and the language of the *Marion* opinion clearly require the establishment of both elements, the Court need not resolve that issue in this case since defendants have shown neither intentional delay nor actual prejudice.

** The fact, prominently featured in King's brief (Br. at 49), that essentially the same information came to the same SEC attorney in April, 1972 via the Denver United States Attorney does not materially advance defendants' claim. Defendants' additional allegation that the SEC had notice of this fraud in 1970 is contrary to fact. SEC Director of Enforcement Sporkin's conversation with Boucher in May, 1970 supplied no more evidence of the fraud than Boucher gave at the trial, and 1970 newspaper criticism of the arctic revaluation was hardly evidence of fraud. There is no evidence that Trueblood's statement in the Wall Street Journal was ever read by anyone at the SEC, and it clearly was not the impetus behind Sporkin's call to Boucher. (App. 224-25, 159).

fendants argue that "the Government had sufficient evidence against King to obtain an indictment on the arctic revaluation" years before the SEC investigation commenced in July 1973 (King Br. at 51), and that this delay was "deliberate and tactfully motivated." (King Br. at 50). The charge, as Judge Frankel concluded, is baseless.

In August, 1970, many months before SEC attorney John Kelly received Frederickson's information about the Mecom side deal, he and other members of the SEC staff commenced an investigation which lasted 2½ years and resulted in two separate criminal reference reports recommending two fraud prosecutions of King, Boucher and others on matters *other than the arctic*. When Dr. Frederickson arrived in March, 1971 with information about Mecom's side deal with respect to the arctic, the matter was not pursued simply because at that time the Denver office was already investigating King and Boucher with respect to "other substantial matters and had already committed a substantial amount of time and effort on those other matters." (App. 264). It is a recognized fact, as this Court has noted, that the SEC for many years has been handicapped by a "limited budget and staff," *United States* v. *Griesa*, 481 F.2d 277, 286 (2d Cir. 1973), and this failure to investigate a third King fraud while engrossed in two others of major proportions was clearly not unreasonable.

Moreover, the significance of Frederickson's information was not, and could not be, immediately understood. The Mecom side deals were not *per se* illegal. The illegality of King's and Boucher's conduct depended on knowledge that other sham sales existed that were being falsely represented to FOF's accountants as bona fide arm's length transactions and that these representations

were being used to revalue FOF's remaining holdings. Frederickson's information did not even begin to give shape to the mosaic of proof, which would later be developed at trial—through the testimony of forty witnesses and the introduction of more than 300 exhibits—demonstrating King's and Boucher's massive fraud. For example, in 1971, the SEC was wholly ignorant of (i) the fraudulent Raff transaction; (ii) the "under the table" approach to Swearingen; (iii) the false representation letters to Arthur Anderson—it was not until June, 1971 that Boucher even executed the false representation letter concerning the Mecom downpayment; (iv) evidence that KRC was obtaining 65 percent of its gross profits from its 35 percent sales to FOF; and (v) King's $1 million loan to Lakeshore on December 30, 1969. Furthermore, while Frederickson's information later proved highly relevant to the Mecom aspect of this fraud, Frederickson's companion allegations about a COG side deal were substantially refuted in 1971 by Harry Cooper, and an earlier interview of Trueblood had uncovered no suggestion of any side deals.* (App. 221, 264). In short, while Frederickson's information was relevant to the Mecom side deal, the Denver SEC office, as of March, 1971, had no knowledge of the total picture of the fraud presented to the jury in the instant case, without which the true significance of the Mecom side deal was not apparent.

In July, 1973, after the SEC had concluded its other major fraud investigations of these defendants,** the in-

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* Frederickson's relative significance as a witness is perhaps best illustrated by the fact that he was not even interviewed by the United States Attorney's office until after the pretrial motions in this case. (App. 224).

** The two cases were referred to the United States Attorney for the District of Colorado on April 27, 1973. (App. 169).

quiry which led to the instant indictment was initiated on the basis of independent information received from attorneys for FOF's natural resources subsidiary. The attorneys provided information indicating that King and Boucher had defrauded FOF in connection with their sale to FOF of numerous natural resource properties, including but not limited to the arctic. In contrast to prior IOS counsel, these lawyers offered complete cooperation to the SEC, including free access to FOF and KRC documents. (App. 243-44). Thereafter, the SEC staff conducted an extensive investigation, interviewing more than 80 people and collecting and reviewing thousands of documents.* (App. 157-58).

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* The defendants' claim that "[t]he Government has failed to supply any reason why a part time investigation conducted by a *Washington* SEC attorney in a case referred to *New York* could have been justifiably delayed in any way because the *Denver* SEC office was busy with other [King] matters." (King Br. at 61). Not so. Obviously, when decisions are made by the SEC whether or not to pursue multiple investigation of a single malefactor, they are made on a national, not local, level. Between August, 1970 and February, 1973, the Denver SEC office was actively investigating two major King frauds. The investigation of still a third King fraud seemed a rather poor allocation of scanty SEC resources until June, 1973, when lawyers representing the IOS-affiliated natural resources subsidiary of FOF appeared on the doorstep of the Washington SEC office, provided abundant information about King's FOF fraud and offered open access to IOS files on the matter.

Defendants related claim alleging the "Government's improper forum shopping for venue in this district" (King Br. at 51), was properly rejected both before and after trial by Judge Frankel. (App. 35-36, 300A-C). At the time the case was referred to New York, the Denver United States Attorney's Office, with far less resources, had already received two major King fraud cases for grand jury investigation. The substantial factual basis for New York venue in the instant matter is set out at length in the Government's Answering Affidavits filed in response to defendants' pre-trial motion on venue. (App.

[Footnote continued on following page]

On September 27, 1974, the SEC referred the case for possible criminal prosecution to the United States Attorney's Office in the Southern District of New York. After a few months of investigating and analyzing the relevant facts, and presenting evidence to the grand jury, an indictment was returned in January, 1975, approximately three and a half years after King had assumed Mecom's arctic obligations pursuant to his secret guarantee. (App. 158).

The SEC and the United States Attorney's Office categorically denied the defense claim below that any of this delay was tactically motivated, and Judge Frankel concurred:

> "And what is still clearer is the entire absence of any devious or otherwise improper conduct accounting for the delay in perceiving the Arctic misdeeds. However much defendants tend to infer or hint at on this score, the court discerns no semblance of a basis for suspicion and no ground for inquiry into the behavior of government investigators or prosecutors.
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> There is in sum no basis for imputing to the Government 'fault' in any possibly pertinent sense

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160-67). Although the activities and transactions referred to at trial took place in numerous locations within the United States, Canada and Europe, a few of the New York contacts can be briefly noted here: (i) the primary victim of defendants' fraud was a mutual fund with a substantial presence in New York and principal offices in Geneva; (ii) FOF's directors approved the arctic revaluation at a meeting in New York City and the two FOF directors who testified at the trial lived and worked in the New York area; (iii) in July, 1970, King and Boucher fraudulently promoted FOF's falsely inflated arctic valuation in a meeting with FOF directors in New York City.

> for the delay in proceeding to indict the defendants." (App. 30).

This ruling was correct.

The initial delay between the receipt of Frederickson's information and the commencement of the third King fraud investigation was occasioned by the same kind of "legitimate" law enforcement considerations involved in pre-indictment delays resulting from continuing investigations into additional criminal activity. (See fn. at p. 53, *supra*). The courts have recognized that such delays are not the product of Government oppression. *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Briggs*, 457 F.2d 908, 911 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

With respect to the period of time consumed by the actual pre-indictment investigation, the courts have recognized that "careful investigation even at the price of delay is to be cherished, inasmuch as '[t]ime-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons.'" *United States* v. *DeMasi*, 445 F.2d 251, 255 (2d Cir.), *cert. denied*, 404 U.S. 882 (1971), *quoting from United States* v. *Feinberg*, 383 F.2d 60, 64-65 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). The very nature of this case, involving a complex course of conduct with many witnesses and vast quantities of documentary proof, required time "for investigation and determination of the need for and extent of criminal charges to be brought." *United States* v. *Stein*, 456 F.2d 844 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972).

Due process claims based on pre-indictment delay have been repeatedly rejected in the absence of a showing that the prosecution purposely delayed to gain some advantage, and defendants' claim warrants no exception. See, *e.g.*, *United States* v. *Schwartz*, *supra*; *United States*

v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (approximately four year delay); *United States* v. *Iannelli*, *supra* (four year, 11 month delay); *United States* v. *Parrott*, 425 F.2d 972, 976 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); (three year delay); *United States* v. *Capaldo*, 402 F.2d 821 (2d Cir.), *cert. denied*, 394 U.S. 989 (1968) (three year, four month delay); *United States* v. *Feinberg*, *supra* (four years, 11 month delay).

B. The Defendants Suffered No Prejudice

Defendants are equally incapable of showing any prejudice resulting from the delay, much less the "specific prejudice" of constitutional dimension required by *Marion*. The defense hinges its primary claim of prejudice on its inability to call as a witness Ed Cowett, the FOF executive chiefly involved in FOF's purchase of natural resource interests from KRC, who died in June, 1974. Since the earliest pre-trial claims on this point, Judge Frankel had asked defense counsel to explain how Cowett's testimony could have assisted the defense. Late in the trial, counsel's final response to that inquiry was a candid, "Your Honor, we do not know." (Tr. 2732).

Clearly Cowett had no knowledge of, and was not involved in, the Mecom or COG side deals, as is apparent from Cowett's detailed memorandum to Conwill in which he explained the entire arctic transaction. (GX 1o). The defendants do not, nor could they, contend otherwise. Moreover, at defendants' request, Cowett's grand jury testimony,* relating to the relationship between FOF and

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* In July, 1970, while being questioned about certain gold transactions by IOS mutual funds, Cowett also gave testimony relating to the arctic revaluation.

KRC, as well as to the history of the arctic sales, was read to the jury, thereby eliciting much of the material the defense now claims became irretrievably lost with Cowett's death. (Tr. 3976-4002). Also, a substantial amount of evidence concerning Cowett's conversations with the defendants and other persons on these same subjects was received at trial, through the testimony of Conwill, Carr, Hubbard, Boucher and King.

Defendants contend, nonetheless, that Cowett could have rebutted allegations that the relationship between KRC and FOF was "fraught with deception" and that "FOF, and especially Cowett had been deceived" as to "the terms of the transactions between FOF and KRC, the nature of KRC's markups and the value of the properties sold to FOF." (King Br. at 52, 53; App. 66). Defendants' enthusiasm for Cowett's thoughts on these matters did not extend to a letter Cowett wrote to Lowry on this very subject, which directly contradicts this contention. (App. 864-67). (At trial, this letter was excluded because of defense objections) (App. 3236-39). In this November, 1970 letter, Cowett discloses that he had been deceived about the fact that KRC had been acquiring properties one day and then immediately re-selling them to FOF at a 10-times or 20-times markup. Cowett complained that this was "clearly contrary" to his original understanding of the KRC-FOF relationship and the standard for the markups.* Boucher

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* The letter (GX 48i) read in pertinent part as follows:

"6. It was my express understanding (and, I believe, the express understanding of each of the FOF Directors) that:

. . . c. The prices to be paid by the Prop Fund were to be no higher than what would be paid by knowledgeable industry purchasers on a negotiated arms-length basis. (While I understood that KR might *vend* properties out of its *inventory* to the Prop Fund at a *mark-up*, I viewed the standard set forth in the previous sentence as protect-

[Footnote continued on following page]

testified that such one-day turnovers were not uncommon, and KRC's own financial records clearly documented the disproportionate size of the markups which were never disclosed to FOF. (Tr. 3227, 3060; App. 847-53). The defense also managed to exclude at trial other evidence (i) that KRC had deceived FOF by continuing to sell to FOF new properties in 1970, even though FOF expressly requested termination of any such new investments, and (ii) that King and Boucher had given false assurances that new property sales had been stopped. (Tr. 198-206, 3204-11; App. 847-53).

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ing the Prop Fund; and, when I visualized sales from 'inventory,' I was thinking in terms of properties held by KR for a meaningful period of time prior to vending, during which period the values of the properties had presumably appreciated by virtue of intervening events.)

. . . I might add that in the last few months I have been advised by IOS personnel that in several instances properties were acquired by KR or affiliated companies one day and vended (either that same day or almost immediately thereafter) to the Prop Fund at a 10 times or 20 times mark-up. Such a practice was clearly contrary to the understandings motivating IOS/FOF to enter into and to continue the relationship with KR.

a. If KR could buy property at $X, this was a clear indication of the value of such property to knowledgeable industry purchasers.

b. If a tract of acreage was purchased by KR for $1 an acre, with a 'turn-about' vending to the Prop Fund at a price of $10 an acre for 50% of the position, such transaction would fly directly in the face of the underlying concept of KR having a meaningful investment in properties along with FOF. (It was never intended that FOF have a partner in resource properties who would have a 'free ride.' We never intended to play a 'heads you win, tails I lose game.')

I do not know all of the facts, and I can only hope that the reports which I have received from IOS personnel as to KR and affiliate excesses are untrue or grossly exaggerated.

If I can be of any further assistance to you in this matter, please advise." (App. 864-67).

Defendants further argue that Cowett could have assisted the defense by confirming a conclusion reached by the KRC trustee "that both he and Bernard Cornfield had been well aware of the manner in which KRC was selling properties to FOF, and that he had encouraged KRC to proceed on that basis." (King Br. at 53).* Notwithstanding Cowett's letter to Lowry, and assuming *arguendo* that Cowett and Cornfeld could testify as to "the manner in which KRC was selling properties to FOF," Cornfeld was clearly available to the defense if they had wished to call him. In fact, in view of King's explanation that "I always talked to Mr. Cornfeld either before or after I talked to Cowett" (Tr. 3641), it is difficult to understand why Cornfeld was not called, unless, as the Government contended, Cowett's testimony would have only helped prove the Government's case. Other FOF officers and directors uncalled by the defense, but equally available to testify as to whether the KRC-FOF relationship was "fraught with deception," included Henry Buhl, James Roosevelt, and Edmund G. Brown; and two other FOF directors, Alan Conwill and Pierre Rinfret, were available on the witness stand when they testified as government witnesses.

Defendants next claim prejudice from the loss of the original Mecom guarantee letter, which King signed and Lowry later destroyed in January, 1972, thereby allegedly precluding a conclusive determination as to the existence of the letter, its terms and its date of preparation. (King

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* A statement to this effect appears in that part of the trustee's report concerning the $100,000,000 damage action filed against KRC by FOF's natural resource subsidiary claiming that KRC had violated its fiduciary duty as an investment advisor by selling FOF properties at inflated prices, which properties in some instances had been determined "valueless" at the time of sale. (App. 207-08).

Br. at 55). The document's loss was the defendant's gain and not the contrary. Its terms and substantial proof of its existence were readily available at trial because the carbon copy (App. 825) of that signed original was still in Lowry's reading file at the time of trial. For some reason, the defense interest in establishing the "terms" of the letter did not prevent their strenuous objections to the admissibility of this carbon copy. (Tr. 1468-71, 4083-86, 4137-52). In any event, contrary to defendants' present claim, the terms and date of preparation were not "the key issues at trial" (King Br. at 55) because the basic defense was that there were no guarantees of any kind at any time. King testified that (i) he never discussed or authorized any such agreement in any respect at any time,* (ii) he never signed any such agreement, and (iii) he would never have given a personal buy-back guarantee to anyone. (Tr. 3519-20, 3537-39, 3731-32, 3736-38, 3772-74, 3884). If that defense was to be believed, the presence of a signed original would be of little consequence.

Defendants argue that the absence of a signed original in Lowry's vault would have corroborated a prior inconsistent statement Lowry made to the effect that a Mecom buy-back agreement had been discussed but not executed. Lowry made this statement more than two years after he sent the guarantee letter to Marriott, when he was being questioned about a totally different King buy-back agreement by the IRS. When asked if he knew of any other buy-back agreements, Lowry, without having any documents to refresh him, mentioned that there was some type of buy-back agreement between King and

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* King's alleged February 10, 1970 conversation with Mecom involved no *guarantees* or *commitments* according to King. (Tr. 3772-74).

Mecom *relating to Colorado Corporation oil and gas leases in West Texas* which had been discussed but not executed. (App. 1252-54). (Mecom and King's Colorado Coporation did negotiate a possible joint venture in the Spring of 1970 which was never consummated. (Tr. 1266-68)). If, as defendants contend, Lowry's comment was a confused reference to the arctic (as opposed to West Texas), he could as easily have been mistaken about whether the buy-back was executed as he was about the geographical location of interest.* Moreover, Lowry's testimony at trial that King signed the original letter and that he retained it in his Chicago office vault after sending Marriot the unsigned draft produced at trial was fully corroborated by Marriott's copy of the guarantee letter ("This letter will be held for our mutual account by Timothy G. Lowry"); by Lowry's contemporaneous handwritten note to Marriott ("The original of attached will be retained in . . . Chicago office vault"); and by Marriott's letter to Frederickson in February, 1971 ("I was advised by telephone [that the Mecom guarantee letter] had been signed by Mr. King"). (App. 799-800, 816-17; Tr. 1401-08, 1413-14, 1430-31, 1439). Finally, even assuming *arguendo* that the original letter in Lowry's vault would have been shown to be unsigned, this would not have diminished the significance of the guarantee letter that Lowry did send to Marriott (App. 799-800), evidencing the precise agreement between King and Mecom set forth in the carbon copy (App. 825), nor could it contradict the testimony of Hulsey, Marriott or Mecom with respect to the guarantees discussed on December 24, 1969. John King's responsibility for the fraud for which he was convicted in no way depended on his signature being found on the original letter to Mecom.

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* At that particular session, Lowry completely forgot a third and unrelated buy-back agreement involving John King which he did mention at a subsequent interview with the IRS. (Tr. 1418-19).

The absence of the Wall Street Journal reporter's notes of his interview with Trueblood hardly merits the defense description of a "significant instance of prejudice." In the first place, there is no evidence of when the notes were destroyed, so that any delay may have been irrelevant. More important, the interview notes were reduced to a newspaper article published the very next day, and this article, of course, was available and introduced as a defense exhibit at the trial. (Tr. 2114; App. 1102-03). Trueblood's comment that he could turn the arctic back to KRC at will did purport to be a direct quote ("he disclosed yesterday. . . ."), and when questioned about it by FOF's auditor, Trueblood did not deny making the statement, but merely claimed it was taken out of context. (Tr. 1809-11, 1876; DX II).

Defendants' remaining claims of prejudice stemming from the impaired recollection of witnesses and the lack of the same kind of accessibility to KRC records which they enjoyed when they ran the company are both factually and legally unsupportable. Defendants, who had a year and a half to prepare for this trial, offer no showing of (1) what KRC documents were unavailable that might have assisted their defense, or (2) why any such documents were not subject to subpoena. The specified failures of recollection by certain witnesses involve details of little or no consequence to the essential facts adduced through these witnesses. The cited inability to recall precise dates or specific statements would have been equally present at a substantially earlier trial.* It is

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* Judge Frankel accurately observed that the defendants' "problem was not a failure of memory in any respect. Rather, viewing the central matters covered in defendants' testimony, their problems were (a) occasional failures of memory that were incredible and, more importantly, (b) sworn recollections and denials that were at least equally incredible in themselves and in the setting of the record as a whole." (App. 29).

well established that this type of "hazy recollection" does not constitute the actual prejudice contemplated under the due process standard. *United States v. Payden*, 536 F.2d 541, 544 (2d Cir. 1976); *United States* v. *Finkelstein*, *supra* at 526.*

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* The defense seeks to reargue numerous other claims of prejudice which were carefully considered and rejected by Judge Frankel. (King Br. at 44n., 45n.). In view of appellants' request that this Court consider allegations detailed in counsel's post-trial affidavit (App. 54-83), the Government respectfully requests that the Court review our detailed response below to these allegations set forth in the affidavit of John R. Wing, filed August 2, 1976. (App. 226-237). Referring here to only a few of the allegations, it should be noted that: (i) Neil MacKenzie was not unavailable, but rather was under Government subpoena and could have been produced for the defense if they had truly wished to call him (Tr 3966-10). (ii) Eric Scott, a former FOF director, died in early 1976, some months after the September, 1975 trial date was adjourned *at the request of King's counsel.* Defendants make no showing of how Scott could have refuted the argument that KRC "ripped off" FOF. (iii) Walter Montague died in January, 1971 and would have been unavailable for trial regardless of any delay. Moreover, his anticipated confirmation of Boucher's testimony was on a point about which there was no dispute. (iv) There is no logical reason or factual showing to suggest that a secretary who types numerous document every day would remember typing or filing the carbon copy of the Mecom guarantee letter (App. 825) any better one year after the event than five years after the event. (v) Defendants argue that they were prejudiced by the loss of Mecom's phone records which might have assisted them in corroborating King's claim of his February 10th phone call with Mecom. Curiously enough, King's counsel made no effort to corroborate that claim by asking Mr. Mecom any questions about that phone call on cross-examination. Nor was Lowry questioned in any way by defense counsel at the trial as to whether he had received the memorandum of the February 10th phone call which King allegedly had sent to him. In any event, it is clear that even if such records established a phone call they in no way could corroborate King's account of the conversation.

After hearing the evidence at trial and considering these same multiple claims of prejudice, Judge Frankel was left with "a definite conviction that defendants were not injured to any material extent by the lapse of time." (App. 31). The clear absence of substantial prejudice bars this claim on appeal. *United States* v. *Stein*, *supra*, 456 F.2d at 848-49.

POINT III

The Government's Case Was Not Tainted By The Defendants' Allegedly Immunized Bankruptcy Testimony.

King and Boucher both contend that their convictions were tainted by the Government's use of immunized testimony they had given at various bankruptcy proceedings. On the contrary, after voluminous submissions by both sides and a post-trial evidentiary hearing, Judge Frankel correctly found that the Government's case was untainted.

A. The Proceedings Below

On May 11, 1976, virtually on the eve of trial (then scheduled to commence on May 17), both defendants filed motions to dismiss the indictment as having been obtained through evidence resulting from testimony allegedly immunized under section 7(a)(10) of the Bankruptcy Act, 11 U.S.C. § 25(a)(10). King's motion claimed that the Government had used directly or indirectly testimony that he gave in 1971 at sessions of the first meeting of creditors in his personal bankruptcy proceedings, pursuant to 11 U.S.C. § 25(a)(10), *supra*, and in 1973 in depositions conducted by civil attorneys of the Department of Justice, pursuant to section 21(a)

of the Bankruptcy Act, 11 U.S.C. § 44(a), in tax litigation related to King's personal bankruptcy proceedings. Boucher contended that the Government had made use of testimony he gave in 1971 at hearings in the KRC reorganization proceedings and in a 1973 deposition conducted by the attorney for KRC's trustee pursuant to Section 167 of the Bankruptcy Act, 11 U.S.C. § 567.

Although the motions were filed more than one year after the date set by the District Court for the filing of pre-trial motions and were based on facts within the knowledge of the defendants before the filing of the indictment,* Judge Frankel agreed to consider the motions and granted a one-week adjournment of the trial's commencement to permit the Government to respond.

In response, the Government submitted a memorandum of law and affidavits from the two Assistant United States Attorneys in charge of the case and the SEC attorney working on the case for the Government. (App. 378-407, 427-31, 512-15). The affidavits established that a search of the more than ten file cabinets of material related to the case in the Government's possession had uncovered the following documents:

(a) Boucher's deposition taken in August 1973 by the attorney for KRC's trustee pursuant to section 167 of the Bankruptcy Act;

(b) the report of the trustee pursuant to Section 167 of the Bankruptcy Act, dated October 10, 1973;

(c) seven pages of testimony given by Boucher in September 1971 at a hearing on a change of venue motion in the KRC reorganization proceedings;

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* The District Court had given the defendants a generous amount of time—forty-five days—after the filing of the indictment on January 20, 1975 to make pre-trial motions.

(d) seven pages of handwritten notes pertaining to a portion of King's examination on August 11, 1971 by counsel for the creditor's committee in King's personal bankruptcy proceedings;

(e) a folder containing press clippings referring to the King bankruptcy;

(f) "Trustee's Application 65" filed in the KRC reorganization proceedings;

(g) the SEC's advisory report on the KRC reorganization plan, filed in August 1975.

The affidavits established that all of these materials were obtained by the Government well after the filing of the indictment in January, 1975, with the exception of the Section 167 trustee report and the "Trustee's Application 65," which the SEC attorney may have obtained in 1973. The prosecutors further asserted that they had no memories of reading any of these materials, and that the materials had been placed, for the most part, in file drawers containing documents considered irrelevant to the case.

In addition, the Government submitted affidavits from persons whom King alleged may have leaked to the prosecution information derived from his bankruptcy testimony. The affidavits established that no such leaks occurred. (App. 408-24, 516-17, 524-36).

Finally, the Government submitted to the District Court, *in camera*, another affidavit from the SEC attorney, with supporting exhibits, setting forth sources, independent of King's and Boucher's bankruptcy testimony, that led the Government to the witnesses and documents through which the indictment was obtained. (App. 605-34).

Judge Frankel, in a memorandum dated May 21, 1976, denied the defendants' motions without a hearing. As to Boucher, the Court found that the Government had made "a powerful demonstration that his testimony, given on August 6 and 7, 1973 . . . pursuant to § 167 of the Bankruptcy Act"—upon which his motion was primarily based—"was not covered by the protective immunity of § 7(a)(10)." (App. 518). With respect to both King and Boucher, Judge Frankel also found that the Government had made

> "a strong showing, through affidavits, that no one connected with this prosecution had access to or read the transcripts of the bankruptcy testimony; that at most there were a few occasions on which anything at all relating to the testimony . . . came into the possession of one or another of the prosecution's staff (and most of these occasions were post-indictment); that no one recalls anything of relevance from these possible scraps; and that no new lines of inquiry were opened, and no evidence discovered, as a result thereof. . . .
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> Going further, the Government has submitted *in camera* an affidavit and documents which demonstrate substantial independent and prior sources of its evidence. The court has examined these materials. . . . They are substantial. It would be senseless now, on the eve of trial, to require anything more. Whatever might be appropriate had the motion been made, as it could have been, many months ago, the sound course in all the present circumstances (including the powerful indications that there is no taint) is to postpone decision, leaving open reconsideration after trial if there is an occasion and a desire for that." (App. 519-20).

The Court concluded that, in the event of a conviction, "the burden will be upon defendant or defendants to renew [the motions] so that a hearing may be scheduled without delay." (App. 521).

King and Boucher renewed their motions after trial. In response, the Government submitted affidavits from the chief prosecutor, the SEC attorney on the case, and an attorney for Global Natural Resources Properties, Ltd. (App. 245-48, 591-604). The affidavits set forth in detail the bases, wholly independent of King's and Boucher's bankruptcy testimony, upon which the Government learned of each witness it presented at trial. In addition, the Government provided the District Court and the defendants with copies of all testimony presented to the grand jury that voted the indictment.*

An evidentiary hearing was held on August 20, 1976, at which Thomson Von Stein, the SEC attorney who had worked on the case, was the only witness examined by the defendants. (App. 635-726). After the hearing, both sides submitted additional memoranda.

Judge Frankel, in a memorandum dated September 1, 1976, adhered to his pre-trial ruling denying the defendants' motions. Judge Frankel found first, with respect to Boucher, that he had not been immunized when he testified in the 1973 bankruptcy proceedings. Secondly, Judge Frankel found that the evidence adduced in the grand jury and at trial derived from sources wholly independent of the immunized testimony:

> "In sum, assuming many issues in defendants' favor, including the proposition that the Govern-

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* The defendants were also given copies of the materials that had been submitted to the District Court *in camera* prior to trial.

ment has a heavy burden to disprove taint, the court finds the burden to have been met in this case." * (App. 35).

Judge Frankel's decision was entirely correct.

B. Boucher's 1973 Testimony Taken Pursuant to Section 167 of the Bankruptcy Act Was Not Made Under a Grant of Immunity

Boucher's claim of taint is primarily based upon the Government's contact with testimony taken from him by the attorney for KRC's trustee pursuant to Section 167 of the Bankruptcy Act, 11 U.S.C. § 567.** The District

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* The District Court also commented on the fact that the defendants, having never requested immunity in the bankruptcy proceedings and having made no effort whatever to prevent dissemination of their testimony, were seeking to turn a veritable molehill into a mountain sufficiently weighty to overturn their well-merited convictions:

> "The court would reach this result even if there had been some slight and accidental leakage from the bankruptcy proceeding to this one. The drastic remedy of voiding an indictment and conviction ought to be available, if at all, when the prophylaxis serves a substantial end, punishing some substantial invasion. Here, never claiming immunity, never seeking to have their testimony shielded from the widest dissemination in the press and elsewhere, defendants were in no sense whipsawed or imposed upon. On the other side, as the grand jury and trial minutes show, there was no purpose to evade or to slight defendants' rights. This would be, in short, a fortuitous and slightly magical reason for concluding now that defendants should not have been tried and convicted after all." (App. 38).

** Boucher also claimed below that the Government's case was tainted by its knowledge of Boucher's 1971 KRC reorganization testimony. This claim is discussed at pages 72-73 fn.*, 77-79, *infra.*

Court properly ruled that Boucher did not have immunity when he testified on that occasion.

Boucher rests his claim that he was immunized at the time of testimony on the provisions of section 7(a)(10) of the Bankruptcy Act, 11 U.S.C. § 25(a)(10), which is part of the chapters of the Bankruptcy Act dealing with "straight bankruptcy":

> "The bankrupt shall . . . at the first meeting of his creditors, at the hearing upon objections, if any, to his discharge and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate or the granting of his discharge; *but no testimony, or any evidence which is directly or indirectly derived from such testimony, given by him shall be offered in evidence against him in any criminal proceeding, except such testimony as may be given by him in the hearing upon objections to his discharge. . . .*" (emphasis supplied).

Collier has described the purpose of section 7(a)(10) as follows:

> "Some opportunity for examination of the bankrupt is essential for a proper application of the law, and it has existed since the very earliest of the English bankruptcy statutes. The purpose of an examination under § 7(a)(10) . . . is to assist in the administration of a bankrupt's property which the court undertakes after adjudication. . . .

> Clause (10) was amended by the Act of 1938 so that the bankrupt must submit to an examination at the hearing upon objections, if any, to his discharge, in addition to the examination at the first meeting of his creditors and such other times as the court shall order." 1A Collier, Bankruptcy ¶ 7.16, at 1005-06 (14th ed. 1976).

Thus, a section 7(a)(10) examination is a requirement that the bankrupt must undergo in order to receive a discharge in bankruptcy.

Failure to appear for examination as directed in section 7(a)(10) is grounds for denying discharge in bankruptcy, see 11 U.S.C. § 32(e); *Monroe* v. *Cussen*, 454 F.2d 1151 (9th Cir.), *cert. denied*, 409 U.S. 846 (1972); *Rose* v. *Mangano*, 111 F.2d 114 (2d Cir. 1940), as is refusal by the bankrupt to answer a material question when being examined. See 11 U.S.C. § 32(c)(6); *In re Zaidins*, 287 F.2d 401 (7th Cir. 1961); *Kaufman* v. *Hurwitz*, 176 F.2d 210, 211 (4th Cir. 1949); *In re Weinreb*, 153 F. 363 (2d Cir. 1907); *In re Marcus*, 149 F. Supp. 496, 497-500 (S.D.N.Y. 1957), *aff'd*, 253 F.2d 685 (2d Cir. 1958).* The im-

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* Prior to 1970, the immunity offered by Section 7(a)(10) was only against the direct use of the bankrupt's testimony against him in a criminal proceeding. Since the Fifth Amendment privilege is displaced only by use and *derivative-use* immunity, see *Kastigar* v. *United States*, 406 U.S. 441 (1972), the bankrupt, until 1970, had the right to refuse to answer questions on the basis of his right against self-incrimination. *McCarthy* v. *Arndstein*, 266 U.S. 34 (1924); *Arndstein* v. *McCarthy*, 254 U.S. 71 (1920). Even a refusal to answer on that ground, however, would bar his discharge in bankruptcy. As part of the Omnibus Crime Control Act of 1970, section 7(a)(10) was expanded to provide derivative-use as well as use immunity, in order to enable "effective displacement of the privilege against self-incrimination by granting protection co-extensive with the privilege." H.R. Rep. No. 91-1549 91st Cong., 2d Sess. (1970), 1970 U.S. Cong. & Admin. News 4007, 4008.

munity offered the bankrupt testifying pursuant to section 7(a)(10) has the "obvious purpose" of encouraging "complete cooperation through full disclosure" to effectuate the proper and full administration of his property. 1A Collier, Bankruptcy ¶ 7.21, at 1016.2 (14th ed. 1970).

The protection afforded by section 7(a)(10), however, extends only to the bankrupt himself. See *White* v. *United States*, 30 F.2d 590, 592 (1st Cir.), *cert. denied*, 279 U.S. 872 (1929); *Kaplan* v. *United States*, 7 F.2d 594, 597 (2d Cir.), *cert. denied*, 269 U.S. 582 (1925); *Knoell* v. *United States*, 239 F. 16, 21 (3d Cir. 1917), *appeal dismissed*, 246 U.S. 648 (1918). And with respect to a corporation, the Act provides:

> "Where the bankrupt is a corporation, its officers, the members of its board of directors or trustees or of other similar controlling bodies, its stockholders or members, or such of them as may be designated by the court, shall perform the duties imposed upon the bankrupt by this title." 11 U.S.C. § 25(b).

This Court has held that section 7(a)(10) confers immunity on the officers, directors or shareholders of a bankrupt corporation only if they are "specifically designated to perform the bankrupt's duties." *United States* v. *Castellana*, 349 F.2d 264, 274 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1969); see *United States* v. *Coyne*, 45 U.S.L.W. 2374 (W.D.N.Y. Jan. 14, 1977).* In the instant case, when Boucher testified

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* *Compare In re Bush Terminal Co.*, 102 F.2d 471 (2d Cir. 1939) (former director and shareholder of corporation petitioning for reorganization not obligated to be examined under section 7), *with United States* v. *Weissman*, 219 F.2d 837, 841 (2d Cir. 1955) ("We also think that the testimony of Weissman . . . was

[Footnote continued on following page]

in 1973, he was not under any court order or compulsion to answer the attorney's questions.

Equally important, Boucher's testimony in August, 1973 was taken pursuant to section 167 of the Bankruptcy Act, and section 7(a)(10) immunity was not available to him in that context. Section 167, which is part of Chapter X of the Bankruptcy Act, the corporate reorganization chapter, provides in pertinent part as follows:

> "The trustee upon his appointment and qualification—
>
> (1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

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within the immunity granted by § 7, sub. a(10). . . . The referee had directed him to sign the schedules in bankruptcy, and that brought him within § 7, sub. b., for he so became one of the 'stockholders or members' of [the corporation] who was 'designated by the court' to 'perform the duties imposed upon the bankrupt.' . . . Our decision in *In re Bush Terminal Co.* . . . did not concern anyone who had been 'designated by the court' to perform the bankrupt's duties.")

There is, moreover, no evidence in the record that even when Boucher testified at the 1971 proceedings he was under a court direction to do so and that his appearance then was anything other than voluntary. See *United States* v. *Castellano, supra*, 349 F.2d at 273-74. Before Boucher testified on one occasion in 1971, he was advised by an SEC attorney (present because the SEC is a statutory party to all reorganizations of public companies) that the attorney did not believe Boucher would receive section 7(a)(10) immunity when he testified, and Boucher was advised of his rights, including the fact that he need not testify. See pp. 89-92 of Boucher's 1971 testimony, appended to the letter of May 21, 1976, from Andrew J. Maloney, Esq., to the Hon. Marvin E. Frankel. (App. 587-90).

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate. . . ." 11 U.S.C. § 567.

The trustee's attorney specifically stated at the beginning of the deposition that he was examining Boucher as a director and officer of the debtor, KRC, which he was empowered to do by order of the Bankruptcy Court and by section 167(2). This examination was in part in preparation of a report to the Court on any "facts . . . pertaining to fraud, misconduct, mismanagement and irregularities and to any causes of action available to the estate." (App. 585D). Boucher had no obligation under section 7 or a court order to testify except to the extent that the trustee was empowered to secure his and other witnesses appearance by subpoena. Boucher was not told by the trustee's attorney that he would receive any kind of immunity for his testimony. He had a right to assert his Fifth Amendment privilege in response to any question, and if he had refused to answer any questions it would not have prevented KRC from entering into a plan of reorganization. In sum, the trustee's attorney deposed Boucher as a director and officer of the debtor, KRC, under section 167(2), and Boucher was not performing any duty imposed upon the bankrupt, as specified in section 7(b), that would avail him of the protection of section 7(a)(10).

This analysis is fully supported by Collier:

"It will be noted that under § 167 officers or directors of the debtor do not appear on behalf of the

> *debtor*, but simply as witnesses, hence the privilege accorded the bankrupt and officers or directors appearing for a corporate bankrupt under § 7a(10) of the Act . . . has no application."

6 Collier, Bankruptcy ¶ 7.19, at 1219 n.11 (14th ed. 1972). See also 11 Remington, Bankruptcy § 4499.1, at 209 (K. Hayes rev. 1961). *Cf. United States* v. *Epstein*, 152 F. Supp. 583, 585-88 (E.D. Pa. 1957).

C. The District Court's Decision that the Government's Case Was Not Tainted by Any of the Allegedly Immunized Testimony Was Correct

Once a defendant has shown that he testified under a grant of immunity to matters related to the prosecution brought against him, the Government has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972). In the court below, the Government submitted affidavits detailing the sources, wholly independent of King's and Boucher's bankruptcy testimony, of the evidence that it presented at trial and to the grand jury. The Government also submitted certain documents that led to the evidence in the case or set forth the sources of that evidence, including a criminal reference report of more than one hundred pages in length, prepared in 1974 by the SEC attorney who investigated the case. Again, these documents or the sources identified in them were obtained by the Government wholly independent of—indeed, most predated—the defendants' bankruptcy testimony. Moreover, an evidentiary hearing was held at which King and Boucher were permitted to cross-examine the SEC attorney assigned to the case.

In denying King's and Boucher's motions after trial, Judge Frankel wrote as follows:

> "The [defendants'] position has been re-examined at length and with care. Defendants, after the trial, were given extensive access to government files, records, and working papers. Defense counsel were permitted to cross-examine at length Mr. Thomson Von Stein, the SEC attorney who had investigated the pertinent events in 1973, had thus been instrumental in bringing about the criminal reference, and later came to assist in the preparation and conduct of the trial. Accepting the credibility of the Assistant United States Attorneys who tried the case, defense counsel disclaimed any desire to interrogate them. Upon the amplified record, the court reaffirms the prior ruling.
>
> . . . .
>
> [T]he court finds here a totally convincing demonstration by the prosecution that there was no use or derived use of the kind defendants posit. Clear, specific, and credible accounts are given to display the untainted sources of the Government's witnesses and other evidence. Cross-examination has not served to impair the persuasive showing made by the Government on this subject. For all their speculations before and after trial, defendants adduce no substantial grounds on which the court would reject the prosecution's position that the evidence to indict and convict 'derived from the independent sources described in the government affidavits.' *United States* v. *Boyd*, 404 F. Supp. 413, 417 (S.D.N.Y. 1975), *aff'd*, [538 F.2d 314] (2d Cir. 1976)." (App. 32-33).

Boucher claims that the Government did not meet its burden of showing no taint,* because the SEC attorney read a transcript of testimony given by Boucher in 1971 to determine what kind of witness Boucher would make and because the Government had in its files a copy of Boucher's 1973 section 167 tesimony. Both of these contacts with allegedly immunized testimony first occurred in 1975, well after the filing of the indictment in this case. More importantly, Boucher has not at any time made any showing of how the Government used this or any other allegedly immunized testimony at trial,** nor has he in any way contradicted the showing made below by the Government of the wholly independent sources of its evidence. The same is true for King.*** See *United States* v. *Bianco*, 534 F.2d 501,

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* Boucher describes the Government's burden as being "almost impossible," despite the fact that, in at least three recent cases in this Circuit where claims similar to the ones here were raised, the Government prevailed. See *United States* v. *Bianco*, 534 F.2d 501, 508-11 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976); *United States* v. *Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States* v. *Boyd*, 404 F. Supp. 413 (S.D.N.Y. 1975), *aff'd without opinion*, 536 F.2d 314 (2d Cir. 1976).

** This Court has rejected the notion that any contact by the prosecution at any point with immunized testimony will irreparably taint its case—an argument that, if it prevailed, would come close to making use and derivative-use immunity into transactional immunity. *United States* v. *Bianco*, *supra*, 534 F.2d at 511 n.14. In *Bianco*, the *prosecuting Government attorney* read a transcript of the defendant's immunized testimony prior to trial in preparing to defend against the defendant's taint motion. The Court held that the case was not prejudiced by the reading because the investigation was completed by that time and the transcript contained no new information that the prosecutor could have used at trial. See also *United States* v. *Catalano*, *supra*, 491 F.2d at 274.

*** King's sole claim on appeal on this point appears to be that the hearing below was inadequate because the District Court did not order the Government to have transcribed certain

[Footnote continued on following page]

508-11 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3249 (Oct. 5, 1976); *United States* v. *Catalano*, 491 F.2d 268, 272 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). See also *United States* v. *First Western State Bank of Minot, N.D.*, 491 F.2d 780 (8th Cir.), *cert. denied*, 419 U.S. 825 (1974).

Again quoting from the District Court's post-trial memorandum:

> "Apart from the fact that none of the material was read by the prosecutors herein, and little by the SEC attorney, defendants have been notably vague and inconsistent in saying what 'leads' or other uses should be thought to have come from their bankruptcy testimony. Defendant King has

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sessions of King's testimony in his bankruptcy proceedings that have never been transcribed. King cites no authority to support this proposition, and offers no reason why he has never had them transcribed himself if he believed they would support his claim. In declining King's application, after the hearing, for further time to transcribe and study this testimony, the District Court noted:

> "The sentence was adjourned for about three weeks beyond the original date (which had been set for some seven weeks after the verdict) to accommodate a generous schedule for preparation, briefing, and argument, all in addition, of course, to the months available for this subject prior to trial. After the hearing and a time for still further supplemental briefing, on August 25, 1976, counsel for defendant King delivered a letter reporting the discovery of further material that might be pertinent and requesting further delay to explore this material. The court declines to extend any further the time for resolution of this motion and the imposition of sentence." (App. 38).

Moreover, assuming *arguendo* that this untranscribed testimony was relevant to the issues at trial, King has failed, both in the District Court and on this appeal, to contradict in any way the Government's showing of sources for its evidence independent of any bankruptcy testimony.

> said substantially nothing in response to the suggestion that he be concrete and specific in this respect. Defendant Boucher has offered some specific suggestions, but they are modest and unimpressive in the setting of the record as a whole. . . .
>
> In sum, assuming many issues in defendants' favor, including the proposition that the Government has a heavy burden to disprove taint, the court finds the burden to have been met in this case." (App. 34-35).

The District Court's decision was fully supported by the evidence adduced below and should not be disturbed. *United States* v. *Bianco*, *supra*, 534 F.2d at 509.

POINT IV

The Court Did Not Err in Denying Boucher's Request to Charge That Reliance on The Advice of Counsel Was A Defense.

Boucher's defense was founded on his unequivocal testimony that he saw no, heard of no and arranged no side deals relating to the arctic sales. His testimony was totally devoid of even a glimmer of a suggestion that he had any awareness of the secret guarantees, but nevertheless signed the Arthur Andersen & Co. representation letters in reliance on legal advice construing the sales to be arms length transactions. Ignoring these elemental facts, Boucher's trial counsel sought to add a fifth wheel to the defense by contending that the jury should be instructed to acquit Boucher if they found he had relied upon the advice of counsel in signing the false representation letters. Boucher now claims

that the trial court erred in denying his request to charge. On the contrary, the denial was entirely correct, since there was insufficient evidence to support such an instruction and the request tendered was incorrect as a matter of law.

During the course of the trial, Boucher submitted a request that the Court instruct the jury that reliance by Boucher on the advice of counsel was a defense to the Government's charges that he made misrepresentations concerning the Mecom and COG sales in letters that he signed for Arthur Andersen & Co. on January 23, 1970, May 27, 1970, and June 14, 1971.*

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* The charge requested was as follows:

"The defendant A. Rowland Boucher claims that he is not guilty of willful wrongdoing because he acted on the basis of advice or in reliance on opinions expressed to him or in his presence by Timothy Lowery [sic, should be Lowry], general counsel for King Resources Company. Specifically, defendant Boucher contends that on or about January 20, 1970, May 25, 1970, and in or about March 15, 1971, Lowery expressed opinions to the effect that the Arctic sales transactions, including the sale with John Mecom, was a bona fide arm's-length transaction; and that directly or indirectly such opinions were expressed to him. Boucher further contends that thereafter on January 23, 1970, May 27, 1970, and June 14, 1971, A. Rowland Boucher made certain representations to the best of his knowledge and belief to Arthur Andersen & Co. in the form of representation letters to the effect the Arctic sale transactions were made on a bona fide and arm's-length basis and that these representations, which are central to the Government's charges, were made after Lowery's opinions and in reliance on Lowery's opinions.

If the defendant Boucher, before taking any action charged as wrongful, sought or relied on the advice or opinion of an attorney whom he considered competent, and in good faith as to the lawfulness of the transactions

[Footnote continued on following page]

In light of this proffered defense, which went to the issue of Boucher's intent, the Government sought to cross-examine Boucher on a remarkably similar act, which occurred approximately one year before the Mecom and COG transactions, in which Boucher and King engineered the fraudulent sale for valuation purposes of certain oil and gas properties by Imperial American Resources Fund, Inc. (IARF), an oil and gas drilling fund managed by a subsidiary of King's Colorado Corporation. See Fed. R. Evid. 404(b). IARF sold interests in drilling partnerships to the public, which interests the investors had the right to redeem at what was called the "cash surrender value." This cash surrender value—the equivalent of the net asset value calculated by FOF for its shares—was supposed to be based on the current value of each partnership's oil and gas interests, many of which had been purchased from KRC. In order to promote investment in IARF drilling funds, and thus indirectly provide more revenue for KRC, King and Boucher devised a scheme to lend credence to the highly inflated cash surrender values of the IARF partnerships by arranging a phony sale, to the Lark Oil Company, of the assets of three of the partnerships at the same price as the previously published cash surrender value of those partnerships. As

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in question and you find that (a) Lowery received a full report of all material facts: or (b) knew of all material facts independently: or (c) Lowery had knowlede of all the material facts that Boucher had knowledge of; then the defendant would not be guilty of willfully and unlawfully making certain representations or omitting to state certain facts in connection with any representations made by him concerning the Arctic transactions being questioned.

Whether defendant Boucher acted in good faith in relying on opinions of Lowery on transactions then being examined is a question of fact for you to determine." (App. 759-69).

in the Mecom and COG transactions, the principals of Lark were induced to make the purchase by secret guarantees and buy-back agreements. (App. 1280B-80C, 1302-03, 1312-15).* The following exchange occurred concerning the cross-examination proposed by the Government:

> "THE COURT: I thought the evidence was perfectly clear yesterday on his cross-examination that he omitted to tell Mr. Lowry a number of the facts about the Marriott letter.**
>
> MR. WING: That's correct.
>
> THE COURT: In that light, I don't know how he could be arguing reliance on the advice of counsel." (App. 1303-04).

Counsel for Boucher and the Government then argued as to the evidentiary basis for such a defense by Boucher (App. 1304-06), and the Court made the following ruling:

> "THE COURT: All right. I will rule as follows: If he [Boucher] testified in answer to [the Government's] questions that he did rely on the advice of counsel and that that explains these rep letters I will allow you to go into the Lark transaction."

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* This fraud is discussed in detail in the Section 167 report of KRC's trustee. (App. 202-04).

** Judge Frankel's memory was correct. Boucher had testified that when Lowry told him in March, 1971, that Marriott's letter to Frederickson was "nothing for [Boucher] to be concerned about," Boucher had failed to tell Lowry about many of the statements in Marriott's letter, such as the agreement that KRC would advance to Mecom the money for the downpayment on his arctic contract and that Mecom would have no obligation to pay any amount under the contract except that which was advanced to him by KRC. (App. 1301C-01G). Lowry, in his testimony, denied discussing the matter with Boucher in March, 1971. (App. 1264A, 1268A-68B).

Argument ensued over the propriety of cross-examining Boucher about the Lark transaction and the admissibility of evidence pertaining to it, but Judge Frankel adhered to his ruling:

> "THE COURT: I think I will rule as I said this time. If Mr. Boucher presses the position—'presses' is the wrong word—stated the position that he signed those representation letters on the advice of counsel and the belief that the transactions were legitimate and valid in the ways that concern us I will allow this proof as part of his cross and as an item of rebuttal." (App. 1318-19).

On cross-examination, the following questions were asked of, and answers given by, Boucher:

> "Q. Sir, at the time you signed this letter [the January 23, 1970 representation letter], did you seek any opinion from any lawyer as to whether or not you ought to sign it?
>
> A. I don't recall that I did, no.
>
> Q. And at the time you signed the letter, were you given, either at the time you signed it or before, were you given any legal advice as to whether or not you should sign this letter?
>
> A. I didn't recall any, Mr. Wing.
>
> Q. Did you, when you signed this letter, rely, Mr. Boucher, on any legal advice of any kind?
>
> A. I would have to say no. That is a very difficult question for me to answer." (App. 1322).

And later:

> "Q. Mr. Boucher, do you recall in May of 1970, May 27th, signing a second representation

letter with respect to the Arctic sales that was virtually identical to the first one? Do you remember signing that letter?

A. May of 1970?

Q. Yes.

A. Yes.

Q. Sir, at that time when you signed that letter did you rely on any legal advice?

A. No, Mr. Wing, not that I can recall.

Q. Did you discuss what was in that letter with any lawyers?

A. Oh, I just don't remember.

Q. To the best of your recollection, you did not discuss it with any lawyers?

A. I just don't recall." (App. 1322D).

As a result of Boucher's testimony, Judge Frankel ruled that he would not deliver Boucher's requested reliance on counsel charge and would not permit the Government to introduce evidence of the Lark transtion:

"[THE COURT] . . . I was led to suppose, Mr. Maloney [Boucher's counsel], as I listened to Mr. Boucher, that as a result of his testimony on cross, you would withdraw your request for reliance on the advice of counsel but I want you to speak to that now.

MR. MALONEY: Your Honor, his testimony on cross is exactly as it was on direct and it was still my basis at that time to submit that charge.

THE COURT: Then I understand you. I am not going to give that charge on this record. I think with deference to Mr. Maloney there is absolutely no basis for that kind of charge; when a man under oath says he has no recollection of

seeking legal advice and no indication he relies on it and no indication of the side deals. I don't think that is a justification for getting the Lark business in.

MF WING: Your Honor, for two reasons I think it [the Lark transaction] ought to be in regardless of what Mr. Boucher says on the stand. The first reasons is, although you wouldn't charge it I suspect Mr. Maloney will argue it and so the jury will have it before them.

* * * * *

THE COURT: Mr. Maloney, . . . I think in the interest of justice, it is fairer and more suitable to direct you not to argue the advice of counsel's defense and on the record as it now stands I will so direct rather than to play that laissez faire game and let you argue it and have me correct it.

If the record changes and you have additional arguments I will reconsider.

MR. MALONEY: Your Honor, I will not pursue the point any further. There is a way I will propose to argue and I will discuss it at the appropriate time with your Honor, how I will tie in the Hubbard memorandum. Whether you can call it reliance or not is a different question.

The COURT: You will have to give me a different request of charge or tell me a different argument.

MR. MALONEY: It would not involve the requests of charge.

THE COURT: All right." (App. 1322A-1322C).*

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* Boucher's trial counsel did, in fact, argue in his summation that Boucher relied upon counsel in signing the two representation letters:

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Judge Frankel's ruling was correct, since there was insufficient evidence to warrant a reliance on counsel charge. Boucher could not recall consulting with or relying on the advice of Lowry or any other attorney in signing the representation letters. This failure to recall any reliance on counsel was hardly surprising, since Boucher unequivocally asserted that he had been unaware of any side deals, guarantees or buy back agreements, oral or written, when he signed the representation letters. (See, *e.g.*, App. 1295A-95F, 1297-98). Boucher's denial that he had knowledge of any side deals—which was plainly the central thrust of his

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"But comes the audit by Arthur Andersen, which they knew was coming—unfortunately, Boucher doesn't remember this; it would have helped him if he remembered it—he sits down, he sits down on January 20, 1970 with Hubbard. Lowry and Boucher sit down with Hubbard. Lowry is the general counsel. Lowry is supposed to, according to the government's proof, know about the side deals. Lowry says these are legal, binding contracts.

Now, Boucher can't remember that conversation, but this document would indicate it happened. What does that do, even though he doesn't remember it? What does that say to you about him signing that rep letter down the road a few days later that they are arm's-length, bona fide transactions when he just heard his lawyer say so?

Unfortunately, he doesn't remember it. He doesn't remember the good things. But if he can't remember the bad things, oh, that's terrible, that's evil, he can't remember the bad things.

. . . .

Rowland Boucher signs another [representation letter] in May, '70, essentially the same rep letter. He doesn't remember getting this, but it's in evidence, a handwritten note from Bill Fishman, counsel to KRC, saying he has reviewed it with TGL, Tim Lowry, and therefore it's okay to sign. So he signs it. He doesn't remember that. It would be helpful if he did remember it. But we know it happened from this document, a document we have put in evidence." (App. 1346B, 1346D).

defense, both in his testimony and in his counsel's arguments to the jury—negates any possible contention that he relied upon the advice of counsel in signing the representation letters (a claim that he never made in his testimony), since Boucher testified that it was his belief in the truth of the letters' representations that caused him to sign them, not the advice of an attorney.

Reliance on the advice of counsel, furthermore, is a factor to be considered in a defense of lack of intent, not lack of knowledge. See *Williamson* v. *United States*, 207 U.S. 425, 453 (1908); *United States* v. *Diamond*, 430 F.2d 688, 694-95 (5th Cir. 1970); *United States* v. *McCormick*, 67 F.2d 867, 870 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). The defense presupposes knowledge of sufficient facts by the defendant to warrant a finding of guilt, but posits that the defendant lacked the requisite criminal intent because of his reliance on the advice of counsel that the actions he contemplated, in view of those facts, were lawful.* Where, as here, the defendant denies knowledge of the underlying facts of the fraud, the necessary predicate for a reliance on counsel defense is absent, and there is no basis in law or the evidence for instructing the jury on that defense. *Cf. United States* v. *Watson*, 489 F.2d 504, 507 (3d Cir. 1973); *United States* v. *Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972); *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970); *McCarty* v. *United States*, 379 F.2d 285 (5th Cir.), *cert. denied*, 389 U.S. 929 (1967); *Sylvia* v. *United States*, 312 F.2d 145, 147 (1st Cir.), *cert. denied*, 374 U.S. 809 (1963); *United States* v. *Di-*

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* Thus, in the generally approved charge on reliance on counsel, it is stated that the *defendant* must have advised the attorney of all relevant facts. See, *e.g.*, *Williamson* v. *United States*, *supra*, 207 U.S. at 453; *United States* v. *Diamond*, *supra*, 430 F.2d at 694; *United States* v. *McCormick*, *supra*, 67 F.2d at 870.

Donna, 276 F.2d 956 (2d Cir. 1960); *United States* v. *Pagano*, 207 F.2d 884, 885 (2d Cir. 1953). *But cf. Hansford* v. *United States*, 303 F.2d 219, 221 (D.C. Cir. 1962); *Crisp* v. *United States*, 262 F.2d 68, 70 (4th Cir. 1958); *Scriber* v. *United States*, 4 F.2d 97, 98 (6th Cir. 1925).

In arguing that the District Court erred, Boucher points to two items of evidence to support the requested charge: (i) a memorandum prepared by an Arthur Andersen accountant of an interview with Boucher and Lowry on January 20, 1970, three days before Boucher signed the first representation letter (App. 1104-06, 1275-78); and (ii) a draft of the May 27, 1970 representation letter from Boucher's files at KRC bearing the handwritten notation "OK—WRF—See prior rep letters. Attached is similar representation. TGL has seen it." (App. 1154-55).* These documents do not support Boucher's claim of error.

First, the discussion described in the Arthur Andersen memorandum dealt only with the specific language in a section of the arctic purchasers' contracts, and whether that language could be used by the purchasers to avoid part of their obligations to pay for exploration and development costs.** It was only that specific contractual lan-

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* Boucher states that the draft of this letter was "retrieved" the Saturday before Boucher's trial testimony by defense counsel from Boucher's files, "which had been in the Government's possession for some years." (Boucher Br. at 7 fn.*, 18 fn.**). In fact, the files to which Boucher refers were obtained by the Government from KRC's trustee several months before trial and both defendants had access to them at all times while in the Government's possession.

** The scope of the discussion is defined in the memorandum's first paragraph:

> "I discussed the nature of this obligation today with Boucher and Lowry. Both parties confirm their under-

[Footnote continued on following page]

guage on which Lowry rendered an opinion at the January 20 conference, and not on the binding nature of the contracts in general or the existence of any side deals. See *United States* v. *Nathan*, 536 F.2d 988, 991 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3331 (U.S. Nov. 2, 1976); *United States* v. *Leonard*, 524 F.2d 1076, 1083-84 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States* v. *Gross*, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961).

Similarly, the mere notation on the draft of the May 27 letter that "TGL has seen it" is not evidence that Lowry rendered an opinion as to the truth of the representations in the letter *that Boucher relied upon* in signing the letter, especially when Boucher's own testimony refutes the notion that such advice was the reason he signed the letter. *Cf. Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962); *United States* v. *McCormick*, *supra*, 67 F.2d at 869-70. Indeed, it is significant that neither Lowry nor William Fishman (the KRC attorney who apparently wrote the note on the draft of the May 27, 1970 letter) was asked by defense counsel when he testified if he had been consulted by Boucher before Boucher signed either representation letter.*

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standing of the negotiations, the intent and legal position of the purchasers, namely, *there is no unilateral way for them to reduce or avoid their expenditure of $11,741,000 in exploration money*. KRC has complete control over the exploration program and thereby controls the call upon this obligation." (App. 1104, 1276) (emphasis added).

The remainder of the discussion described in the memorandum dealt with Lowry's and Boucher's construction of the specific language in the contract about which Arthur Andersen was concerned.

* In response to a question by the Government, Fishman testified that he was not asked to give and gave no advice to Boucher about the representation letter Boucher signed on June 14, 1971 concerning the Mecom transaction. (App. 1292R).

Moreover, the representations in the letters signed by Boucher are largely factual and do not pertain to matters calling for legal advice or opinion. The January 23, 1970 representation letter reads, in pertinent part, as follows:

> "In connection with your examination of the financial statements of King Resources Company and the Natural Resources Fund account of Fund of Funds Limited as of December 31, 1969, you have inquired whether we have knowledge of any repurchase commitments, guarantees or other contingencies relating to the following sales made by the Company of interests in arctic petroleum and natural gas permits. . . .
>
> We give you our assurance that, to the best of our knowledge and belief, there are no arrangements, verbal or written, through which the Company, any of its subsidiaries, or any Company officers or companies controlled by them, have committed to acquire any of the interest sold, or have guaranteed in any way the economic results of the transactions to the purchasers. It is our opinion that the transactions are bonafide sales in all respects and were negotiated on an arm's length basis with the respective purchasers." (App. 843).

The May 27, 1970 (App. 846) and June 14, 1971 (App. 846A) letters contain similar language. While the last sentence of the January 23 letter, in which King and Boucher state their opinions that the transactions were "bonafide sales" and were "negotiated on an arm's length basis" could arguably have called for Boucher seeking legal advice, the remainder of the letter contains as-

sertions of facts within Boucher's knowledge, not legal conclusions.*

A lawyer is not a talisman with which one can ward off responsibility for all one's acts, even those that in no way require legal guidance or expertise. Boucher had no reason or right to rely upon the advice of any attorney as to whether or not to make the representations in the letters to Arthur Andersen. See *United States* v. *Powell*, 513 F.2d 1249, 1251 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975) (an instruction on reliance on advice of counsel "'is appropriate only in a limited class of cases, in which willful action is an essential element, and legal problems are present,'" *quoting* 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 16.15, at 315 (2d ed. 1970)); *United States* v. *Diamond*, 430 F.2d 688, 694-95 (5th Cir. 1970); *Bisno* v. *United States*, *supra*, 299 F.2d at 720.**

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* The June 14, 1971 letter is even stronger in this respect. In it, Boucher only makes specific factual representations concerning the Mecom sale.

> "In connection with John Mecom's proposed assignment to The Colorado Corporation of his interests and obligations under the December 24, 1969, Arctic contract, you have raised specific questions. Accordingly, we, as present management of the Company, represent that we do not intend to consent to the proposed assignment, and have no knowledge that Mr. Mecom's downpayment to the Company might have been financed through a transaction with an associated entity (i.e., The Colorado Corporation and subsidiaries other than as as a result of representations included in the documentation concerning the proposed assignment); and, further, we did not particpate in any way on behalf of the Company to arrange any downpayment financing for Mr. Mecom on this contract, if there was in fact downpayment financing." (App. 846A).

** It should also be noted that for a defense of reliance on the advice of counsel to be sustainable, the attorney must have been given all the facts relevant to the matter upon which he rendered an opinion. *Williamson* v. *United States*, *supra*, 207

[Footnote continued on following page]

In light of all the evidence in the case—most notably Boucher's own testimony, in which he categorically denied any knowledge of any side agreements and did not claim that he relied upon counsel in signing the representation letters—Judge Frankel correctly held that there was insufficient evidence to give the jury the charge on reliance on counsel requested by Boucher.* *United States* v. *Nathan*, *supra*, 536 F.2d at 991; *United States* v. *Licursi*, 525 F.2d 1164, 1169 (2d Cir. 1975); *United States* v. *Leonard*, *supra*, 524 F.2d at 1083; *United States*

U.S. at 453. Although Lowry drafted the guarantee letter that was given to Mecom and Marriot, there was no evidence that he was aware of several of the important aspects of the side deals that the Government's evidence showed were given to the arctic purchasers, such as (i) the assurance to Mecom that he would have no obligation or liability to pay any amount under the contract except what was advanced to him by KRC; (ii) the $275,000 that was in fact advanced to Mecom to make the down-payment on his arctic contract; and (iii) any aspect of the side deal with COG. Indeed, Boucher admitted that when he discussed Marriott's letter to Frederickson with Lowry in March 1971, he did not advise Lowry of many of the allegations in Marriot's letter. (App. 1301C-01G). Assuming *arguendo* that Lowry did render an opinion that Boucher utilized in signing the representation letters, there was no evidence whatsoever from which the jury could have inferred that Lowry was privy, when he rendered that opinion, to all relevant information pertaining to the transactions referred to in those letters. See *United States* v. *Hickey*, 360 F.2d 127, 142-43 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Cox*, 348 F.2d 294, 296 (6th Cir. 1965).

* It should be remembered that Judge Frankel's ruling was a double-edged sword, as Boucher's failure to claim reliance on counsel in signing the representation letters also caused the Court to preclude the Government from offering evidence of Boucher's involvement in the fraudulent Lark Oil transaction, the admission of which evidence defense counsel strenuously opposed.

Moreover, despite Judge Frankel's ruling, Boucher's counsel did, in his summation, place the reliance on counsel defense before the jury. *Cf. United States* v. *Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976).

v. *Miley*, 513 F.2d 1191, 1202 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975); *United States* v. *Gross*, *supra*, 286 F.2d at 61; *Bisno* v. *United States*, *supra*, 299 F.2d at 719-20 ("[A]dvice of counsel has been held to be no defense in a situation in which the accused is generally advised by counsel but counsel is not shown to have advised the specific course of action with which the accused is charged." *Id.* at 720); *United States* v. *McCormick*, *supra*, 67 F.2d at 870.*

Finally, even if Boucher had been entitled to a charge on the advice of counsel defense, the charge he requested was incorrect as a matter of law and properly rejected for that reason alone. See *United States* v. *Leonard*, *supra*, 524 F.2d at 1084. ("[T]o put a trial court in error for declining to grant a requested charge,

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* Boucher's reliance on *United States* v. *Platt*, 435 F.2d 789 (2d Cir. 1970), is entirely misplaced. In *Platt*, the defendant was charged with wilfully failing to file his personal income tax returns for several years. The defendant requested a charge on reliance on an accountant based on testimony of the accountant that he had sought and obtained for the defendant extensions of time to file for limited periods from the Internal Revenue Service, and had advised the defendant that extensions had been granted. The defendant did not testify at all, and the record was left unclear as to whether the accountant had advised the defendant erroneously that the extensions were continuous. In that circumstance, this Court found that there was enough, though barely, to require a reliance charge to be given, and found that the District Court had erred in giving a charge that in effect withdrew the reliance issue from the jury's consideration. Here, by way of contrast, there was no evidence whatever to suggest that Boucher had relied on Lowry's advice. More importantly, unlike Platt, Boucher testified that he was unaware of the underlying facts that would have caused him to seek legal advice, and he did not claim that he in fact relied on such advice. Finally, Judge Frankel did not in his charge preclude consideration by the jury of the defense argument that Boucher relied on counsel.

the proffered instructions must be accurate in every respect.") *United States* v. *Leach*, 427 F.2d 1107, 1112-13 (1st Cir.), *cert. denied*, 400 U.S. 829 (1970). Reliance upon advice of counsel is not an absolute defense, but only a factor to be considered by the jury in passing upon a defense of good faith and lack of wilfulness. *Williamson* v. *United States*, *supra*, 207 U.S. at 453; *Shushan* v. *United States*, 117 F.2d 110, 118 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941); *United States* v. *Becker*, 203 F. Supp. 467, 469 (E.D.Va. 1962). When a man relies on the advice of a lawyer whom the man has no reason to believe is aware of all facts relevant to the matter on which advice was sought, that man has not acted in good faith. Thus, it is generally stated that for the reliance on counsel defense to be available, the defendant himself must have advised the attorney of all relevant facts. See *Williamson* v. *United States*, *supra*, 207 U.S. at 453; *United States* v. *Diamond*, *supra*, 430 F.2d at 694; *United States* v. *McCormick*, *supra*, 67 F.2d at 870. The charge requested by Boucher would have made the defense available to him if Lowry "(b) knew of all material facts independently: or (c) Lowery [sic] had knowledge of all the material facts that Boucher had knowledge of . . .," regardless of whether Boucher reasonably believed Lowry to be fully informed. The requested charge is deficient because there is no requirement that, if Boucher did not inform Lowry himself of all relevant facts, Boucher at least have reasonably believed that Lowry had knowledge of all material facts. Under "(c)" in the portion of the request quoted above, for example, Boucher would have been entitled to the defense even if Lowry did not have knowledge of important relevant facts and Boucher did not reasonably believe that Lowry knew all relevant facts. If Boucher nevertheless acted upon Lowry's advice under those circumstances, Boucher would not, of course, ave been acting in good faith.

Further, the jury must be advised that reliance on the advice of counsel may excuse a man's actions only if he

> "in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful. . . . [N]o man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel."

Williamson v. *United States, supra.* The absence of qualifying language to that effect in Boucher's request to charge made it erroneous as matter of law. See *Shushan* v. *United States, supra.* The requested charge also should have cautioned the jury that the defense could be raised only if counsel had advised Boucher, as a matter of law, that the representations in the letter were correct. *United States* v. *Diamond, supra,* 430 F.2d at 694-95; *Bisno* v. *United States, supra,* 299 F.2d at 720.*

POINT V

King's And Boucher's Miscellaneous Attacks On The Trial Court's Evidentiary Rulings And Charge Are Without Merit.

In Point III of his brief, Boucher, joined by King, makes various claims of prejudicial error in the trial court's evidentiary rulings and charge. Some of the arguments border on the frivolous; all are without merit.

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* Boucher's request also incorrectly stated that the defense was available "[i]f . . . Boucher, before taking any action charged as wrongful, *sought* or relied on the advice or opinion of an attorney . . . ." (emphasis added). Merely seeking the advice of an attorney would not establish a defense of good faith.

A. The Government's Evidence Concerning the Profitability of KRC's Business With FOF Was Relevant to King's and Boucher's Motives and Was Properly Admitted.

King and Boucher complain that Judge Frankel erred in permitting the Government to present testimony and charts concerning the profitability to KRC of its business with FOF. This evidence was properly offered as bearing on King's and Boucher's motives for arranging the fraudulent sales upon which the indictment focused, and Judge Frankel acted well within his discretion in receiving it.*

Proof of a defendant's motive for committing a crime with which he is charged is always relevant, and trial courts have broad discretion to admit evidence of a fact tending to suggest a motive for the act charged. *Moore* v. *United States*, 150 U.S. 57, 60-61 (1893); *United States* v. *Fernandez*, 497 F.2d 730, 735 (9th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Rosenberg*, 195 F.2d 583, 595-96 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); 2 J. Wigmore, Evidence §§ 385-406 (3d ed. 1940).

In the instant case, evidence of King's and Boucher's motives for committing the crimes charged was important,

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* King and Boucher contend that the evidence was offered to show that the markups on properties sold to FOF were fraudulent and that the defendants misrepresented the value of the properties to FOF, as charged in paragraphs 18 and 19 of the indictment. Judge Frankel, however, explicitly stated that he would not admit the evidence for that purpose and would limit its admission only to the issue of motive (App. 1212-18, 1268E-68S), and delivered to the jury instructions so limiting it. (App. 1292F-92H, 1451-53).

since the upward revaluation of the arctic properties—the basis of the charges in the indictment—ostensibly benefitted FOF, the victim of the alleged fraud, and did not appear directly to benefit King, Boucher or their companies. Evidence that showed how King, Boucher and their companies profited from their relationship with FOF was thus vital to explain why King and Boucher would be willing to commit the frauds with which they were charged in order to continue their profitable relationship with FOF. *Cf. United States* v. *Bradwell*, 388 F.2d 619, 620-21 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States* v. *Abrams*, 357 F.2d 539, 546 (2d Cir.), *cert. denied*, 384 U.S. 1001 (1966); *Untied States* v. *Houlihan*, 332 F.2d 8, 14-15 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964).

The Government's evidence in this regard consisted of the testimony of an SEC accountant and five charts or schedules he had prepared summarizing certain information contained in the books and records of KRC, Colorado Corporation and their subsidiaries. The charts and schedules summarized the following information:

> (1) Government Exhibit 38L (App. 847-53) was a detailed schedule of lease sales—sales of interests in natural resource properties. (App. 1292E) —from KRC to FOF for the three-year period ending on December 31, 1970. The first four pages of the schedule summarized information recorded in KRC's books and records concerning all lease sales from KRC to FOF totalling more than $100,000 during this three year period. The summary included the percentage of the natural resource interest sold to FOF (KRC sold to FOF undivided percentages of natural resource interests KRC owned); the price paid by FOF for the interest; the direct cost of the interest to KRC; and the

gross profit earned by KRC—the difference between the price paid by FOF and the direct cost to KRC;* the percentage of gross profit earned by KRC on the lease sale (*i.e.*, the percentage of each dollar earned that was gross profit); and the ratio of the price paid by FOF to the cost incurred by KRC.

At the end of page four of the schedule, this information was totalled for the thirty-five lease sales set forth.

The last three pages of the schedule tied in for each year the totals for the major lease sales by KRC to FOF, as set forth on the preceding four pages, to a gross income figure called "sales of resource interests, related services and other" on KRC's audited financial statements (*i.e.*, the income and costs were set forth that made up the difference between the totals for the major KRC-FOF lease sales and the gross income figure, such as lease sales to FOF under $100,000, drilling and completion sales,** and sales of entities other than FOF).

(2) Government Exhibit 38N (App 855-61) was a detailed schedule setting forth the same type of information contained in Government Exhibit 38L for all lease sales by Colorado Corporation to

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* The price, direct cost and gross profit information was broken down for each year, 1968, 1969 and 1970, and was also added up for the three year period.

** A drilling sale was an agreement by KRC to drill a well for a customer to a certain depth to ascertain the oil and gas potential of an area. A completion sale was an agreement by KRC to complete a well for a customer to allow the production of oil and gas. (App. 1205C-05D).

FOF in 1969 and 1970 (Colorado Corporation did no business with FOF in 1968).* In addition, on eighteen of the forty-one lease sales an amount equalling approximately 10% of the sales price was subtracted from that price to determine the revenue received by Colorado Corporation and its gross profit. That 10% was a fee that KRC added on to the price of certain of the lease sales by Colorado Corporation to FOF and that KRC kept.

The schedule also tied in the totals for these sales in 1969 to the gross income figure on Colorado Corporation's audited financial statement for 1969. No such tie-in could be done for 1970 because no audited financial statement was prepared that year for Colorado Corporation. The total sales to FOF (and accompanying direct costs) for that year were, however, added to the total for sales to entities other than FOF to arrive at the total sales, direct costs and gross profit figures for 1970.

(3) Government Exhibit 38M (App. 854) was a bar chart showing how much FOF contributed to KRC's sales and gross profits from natural resource interests and related services—which was KRC's primary source of income—in 1968, 1969 and 1970. In 1968, sales to FOF ($11,829,000) constituted 36.5% of KRC's total sales ($32,405,000), but contributed 68.76% of KRC's gross profit for the year ($6,974,000 out of $10,156,000). In 1969, sales to FOF ($41,259,000) constituted 39.26% of KRC's total sales ($105,100,000), but contributed

* Most of the stock of Colorado Corporation was owned by King or trusts for members of his family. In addition to earning income on direct lease sales to FOF, Colorado Corporation earned a 5% "commission" on all lease sales that KRC made to FOF.

64.47% of KRC's gross profit ($27,741,000 out of $43,031,000). Finally, in 1970, sales to FOF before its relationship with KRC ended ($14,856,000) made up 52.21% of KRC's total sales ($28,453,000), and contributed 67.25% of KRC's gross profit ($9,526,000 out of $14,164,000).*

(4) Government Exhibit 38-O (App. 862) was a bar chart similar to Exhibit 38M for the Colorado Corporation for 1969 and 1970. The chart showed that in 1969, sales to FOF ($14,108,000) constituted 93.27% of all the Colorado Corporation's sales of natural resource interests and related services ($15,127,000), and 93.12% of its gross profit from this activity ($9,557,000 out of $10,264,000). In 1970, sales to FOF ($3,491,000) made up 77.92% of total sales ($4,480,000) and 95.98% of Colorado Corporation's gross profit ($2,282,000 out of $2,378,000).

(5) Government Exhibit 38P (App. 863) was a bar chart summarizing the combined sales and gross profit figures for sales of natural resource interests and related services for KRC over the three year period ending December 31, 1970, and for Colorado Corporation over the two year period ending December 31, 1970. The chart shows that over those three years, sales to FOF ($67,944,397)

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* King and Boucher complain that this chart "portrayed 1970 as another banner year for KRC" when "KRC lost more than $53 million in 1970." (Boucher Br. at 34 fn *). The chart does no such thing, since it shows KRC's sales and gross profits declining sharply from 1969 to 1970. In any event, the point of the chart is not that KRC had a banner or a dismal year over-all in 1970, but that its business with FOF was very profitable. Without the money it earned from FOF, KRC's total loss for 1970 would have been vastly greater.

made up 40.94% of all such sales by KRC ($165,959,098),* but contributed 65.69% of KRC's gross profit from this activity ($44,241,364 out of $67,351,532). For the two years ending December 31, 1970, sales to FOF ($17,599,012) made up 89.76% of Colorado Corporation's total sales ($19,606,767) and contributed 93.65% of its gross profit ($11,840,081 out of $12,642,279).**

This evidence showed not just that FOF was an important customer for KRC and Colorado Corporation, but exactly how important it was. More specifically, it detailed the extent of the KRC-Colorado Corporation relationship with FOF and showed that while FOF was their most important customer in terms of sales volume, it was an even more vital contributor to their gross profits. With this information, it was far easier for the jury to understand why King and Boucher were willing to

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* The chart also showed that KRC's total sales over this three-year period were $185,966,587, of which $20,007,489, or slightly more than 10%, came from sources other than sales of natural resource interests and related services. In other words, sales of natural resource interests and related services constituted almost 90% of KRC's total sales during this period.

* The Government also introduced a sixth chart (GX 38Q) that showed that the low bid price on the over-the-counter market for KRC common stock during the first quarter of 1968, shortly before the start of the KRC-FOF relationship, was $9.25 per share, and that by December 31, 1969, the approximate date of the fraudulent Mecom and COG transactions, the low bid price had almost tripled to $27.38 per share. (App. 1292M-92P). On May 1, 1968, King owned or beneficially owned 1,065,768 shares of KRC common stock and Boucher owned or beneficially owned 43,500 shares, while on December 31, 1969, after a three-for-one-stock split (all stock prices on Government Exhibit 38Q were adjusted to what they would have been after this split), King owned or beneficially owned 3,066,569 shares of KRC common stock, and Boucher owned or beneficially owned 149,100 shares. (App. 1292A-92D).

arrange fraudulent transactions for FOF's benefit and lie about those transactions so that FOF would believe it was benefitting from their relationship and would continue it.

King and Boucher claim, however, that the evidence was "inaccurate," "distorted," "irrelevant" and "calculated to inflame the jurors" (Boucher Br. at 27), and have fired a fusillade of arguments intended to show that it deprived them of a fair trial. Space limitations make it impossible to respond in detail to each minute bit of unjustified criticism King and Boucher heap upon the prosecution and the Court below.* An examination of what appears to be their chief contentions, however, will show this claim's utter lack of merit.

It is argued, for example, that the basic facts bearing on the issue of motive were conceded by the defendants, so any proof relating to motive should have been kept to a minimum. (Boucher Br. at 27 fn.*). Virtually all the page references cited to support this contention are from the testimony of the defendant King, whom the Govern-

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* King and Boucher claim, for example, that Judge Frankel unfairly cut off their cross-examination of an Arthur Andersen accountant concerning work papers (DX AC for identification, App. 1107-16) "indicating" that KRC's markups on sales to FOF were reasonable for the oil industry. (Boucher Br. at 37-38). Judge Frankel did, in fact, permit defense counsel to question the witness about that exhibit, and the specific question that Judge Frankel cut off had nothing to do with the reasonableness of the markups. (App. 1278A-78D, 1279-80). King and Boucher also complain that the trial court prevented them from showing that KRC's trustee sold interests at markups similar to what had been charged FOF. (Boucher Br. at 38). The trustee's sales were in 1971-73, and Judge Frankel excluded such evidence because it would raise complex side issues concerning changed economic and world conditions. He would, however, have permitted the defendants to show markups on other transactions in 1968-1970. (App. 1212-14).

ment could not call as a witness on its direct case. Further, when Judge Frankel pressed King and Boucher to stipulate to the sales and gross profit figures in lieu of the testimony and charts the Government proposed to offer—to which the Government agreed—they refused because "the numbers . . . require further explanation." (App. 1548-50). In any event, the Government was surely not limited to having persons testify that FOF was KRC's largest and most important customer, and was entitled to show the jury—through evidence that took less than half a day of a six-week trial to present—the concrete numbers that showed that FOF's business was more profitable for KRC than other business.*

King and Boucher also contend that the direct cost figures on the Government's charts and the resulting gross profit calculations were misleading because they did not take into consideration various other indirect costs. That these figures omitted such costs was conceded by the Government and brought out in the direct testimony of the Government's accountant witness. The accountant explained that it was impossible to allocate those costs to a specific project or customer of KRC or Colorado Corporation because neither company did so in its own books and records. (App. 1292I-92K). If the Government had overlooked a way, using KRC's books and records, to allocate these additional indirect costs to KRC's business with FOF, King and Boucher could have pointed that out and done so themselves, which they did not do.**

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* King denied in his testimony that FOF was KRC's most profitable customer. (App. 1331E-31I).

** King and Boucher contend that the Government arrived at the "misleading" gross profit figures by ignoring KRC's inventory accounts, implying that those records allocated the indirect costs to specific projects or customers. (Boucher Br. at 32). There is no evidence indicating that the inventory accounts did so, and, in fact, on the very next page of Boucher's brief, it is conceded that "KRC did not attempt to allocate its indirect costs to particular projects. . . ."

In short, the Government was forced to use gross, rather than net, profit figures in its presentation because of the manner in which KRC and Colorado Corporation kept their records, and this and other alleged deficiencies in its presentation were fully aired before the jury. That the gross profit figure is of some significance, however, is indicated by the fact that KRC's turnkey ledgers—the books in which KRC recorded the costs of and revenues from its natural resource projects (App. 1205E-05F)—contained an entry equivalent to gross profit. (App. 1205B, 1292Q).

King and Boucher suggest for the first time on this appeal that the Government should have allocated the indirect costs in proportion to sales, pointing out that this would have made the figures on the detailed schedules (GX 38L and 38N) more favorable to them. However, this would also have made the bar charts showing KRC's sales and profits reflect an even higher percentage of profit attributable to the FOF business. Since the percentage of sales revenue from FOF was less than from "others" (in 1969, for example, approximately 39% of KRC's sales was from FOF and 61% from others), more of the indirect costs would be allocated to "others" than to FOF. This, in turn, would reduce KRC's profit on its business with "others" more than on its business with FOF, and would cause FOF to account for an even greater percentage of its profit than what was reflected on the bar charts (in 1969, for example, FOF accounted for approximately 64% of KRC's gross profit). It was to this comparison between sales revenues and gross profits that King and Boucher most strongly objected below. (App. 1268Q-69T).

Responding to these and other arguments King and Boucher make tends, however, to lend them a significance that they do not deserve. They are largely factual argu-

ments concerning the accuracy and completeness of the Government's presentation—arguments that King and Boucher had full opportunity to make before the Court and jury below. As already pointed out, the Government had the right to present evidence of the defendants' motives, and, despite King's and Boucher's present arguments to the contrary, this was the only reason this evidence was offered and Judge Frankel clearly and forcefully limited its receipt to that purpose. (App. 1292F-92H, 1451-53).* The charts and schedules were properly admitted as summaries of information in KRC's and Colorado Corporation's corporate books and records in evidence. *United States* v. *Kyle*, 257 F.2d 559, 563-64 (2d Cir. 1958), *cert. denied*, 358 U.S. 937 (1959); *United States* v. *Schenck*, 126 F.2d 702, 708-09 (2d Cir.), *cert. denied*, 316 U.S. 705 (1942). Each defendant had ample opportunity to cross-examine the Government's witness and show any limitations or alleged distortions in the information set forth on the charts. Indeed, each defendant testified as to what he thought were distortions in the Government's figures. (App. 1301A-01B, 1331A-31I, 1340L-40X).** King and Boucher could have presented their own figures showing what they considered to be the true relationship between KRC, Colorado Corporation and FOF, or called an accountant of their own as a

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* In arguing that the Government "intended" this evidence to show something more than motive, King and Boucher cite a Government sentencing memorandum and trial memorandum, neither of which, of course, was presented to the jury. Furthermore, a full reading of the portion of the prosecutor's summation dealing with the profitability of the FOF business—not just the parts taken out of context in Boucher's brief—shows that the Government only argued that this evidence bore on the defendants' motives. (App. 1344E-44H).

** In addition, King called as a witness William V. Coffey, a former executive vice president of KRC, to point out supposed deficiencies in the Government's analysis. (App. 1292S-92BB).

witness to controvert the testimony of the Government's witness, but chose not to do so. *United States* v. *Kyle*, *supra*, at 563-64.*

In sum, King's and Boucher's arguments concern matters that were within the sound discretion of the trial judge—a discretion that was far from abused by Judge Frankel **—or that were issues of factual dispute for the jury. As appellate issues, they are completely without substance.

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* King and Boucher did have an accountant at the defense table during the testimony of the Government's accountant witness, apparently to aid in cross-examination.

** King and Boucher gratuitously characterize Judge Frankel as having "waffled" on whether to permit the Government to prove the extent and profitability of KRC's and Colorado Corporation's business with FOF. (Boucher Br. at 28-29). This characterization is typical of the level of argument King and Boucher reach on this point. Judge Frankel kept his mind open on the propriety of admitting this evidence, and at various points throughout the trial permitted counsel for both side to present arguments for or against its admission. In similar fashion, Judge Frankel excluded late in the Government's direct case proof of a similar act in which King and Boucher, for valuation purposes, induced a party, through a side agreement involving secret financing and guarantees, to purchase oil and gas property from a fund managed by a subsidiary of Colorado Corporation. Judge Frankel excluded this evidence, on reconsidering the defendants' continuing objections to it and over the Government's strenuous arguments for its admission, even though he had earlier indicated he would admit it. (App. 1280A-80H, 1281). If Judge Frankel had ruled at the outset of the trial that the Government could present its sales and profit evidence and cut off any further argument on the point by the defense, King and Boucher would doubtlessly complain now that Judge Frankel had been inflexible and unwilling to hear them out.

B. The Government Did Not Mischaracterize the Effect of the Global Spin-off

In the Spring and Summer of 1970, FOF faced a serious liquidity crisis caused by large numbers of share redemptions at a time that a large percentage of its assets were in the form of the illiquid natural resource properties sold to it by KRC and Colorado Corporation. As a result of this problem, FOF, at the close of business on August 7, 1970, "spun-off" the illiquid assets into a new company, Global Natural Resources Properties, Ltd. (Global), with shares that were not redeemable. The immediate effect of this on the FOF shareholders was that prior to the close of business on August 7, he or she held shares of FOF redeemable at $18.47 per share, and after that he or she held shares of FOF redeemable at $7.44 per share and an equal number of shares of Global. An over-the-counter market developed in Europe for the Global shares at approximately $2 to $3 per share. (App. 1201F-1201-O).

King and Boucher complain that the Global spin-off

> "was used by the prosecutors as if it showed the Arctic's true value in 1970. The Government argued that the difference between the $11.03 per share of value supposedly attributable to the transferred assets and the bid price for Global's stock was somehow an accurate reflection of the damage appellants had inflicted upon FOF stockholders." (Boucher Br. at 42).

The only argument made by the Government concerning the spin-off was in its rebuttal summation, when reference was made to

> "Fund of Funds shareholders . . . whose assets were withdrawn by payments in redemptions of this excessive value. That is the 18 million. And,

> whose assets were drawn out by the $10 million performance fee to [an] IOS subsidiary, whose assets were drawn out for further purchases from King Resources, and whose assets ultimately, in one day, ladies and gentlemen, one day, you may recall went from $11 a share to $2 a share. When that fund spun out its natural resource interest into a closed corporation and the marketplace value, the price of those assets, not at $11, not at $63 an acre, but $2 a share. Think about those shareholders." (App. 1346E).

This was a fair argument. FOF's liquidity crisis was brought about in large part by its commitment of large amounts of capital to natural resource interests sold to it by KRC and Colorado Corporation—a commitment that the arctic revaluation was designed, the Government argued, to encourage. When this large investment in illiquid assets forced FOF to spin-off Global, transferring to it assets that FOF had valued at about $11 per share, FOF shareholders were left holding Global shares valued on the market at approximately $2 to $3 each. Whatever differences there may be between a mutual fund's per share asset valuation and the market value of stock,* the simple fact is that, after the spin-off, the price that a shareholder could get for one share of FOF and one

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* King and Boucher complain that they attempted to have Alan Conwill, a former FOF director, explain the difference between the two values but were "cut off by the Court and the jury never received any illumination on the subject." (Boucher Br. at 42). Assuming it was important that the jury be so illuminated, the question cited to which the trial court sustained an objection was improper as to form and sought to elicit an opinion without laying a proper foundation. After the objection was sustained, counsel for King chose not to pursue the matter any further. (App. 1205-05A).

share of Global was about $8 or $9 less than he or she could have received for one FOF share before the spin-off.*

The Government's statements concerning the Global spin-off were, in short, strictly within the bounds of permissible argument and were fully supported by the evidence. See *United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975).

C. The Trial Court Properly Excluded Evidence of The Current Value of The Arctic

King and Boucher sought at trial to offer evidence of the current value of the KRC-FOF holdings in the Arctic. The District Court precluded them from doing so because such evidence would have been irrelevant to the issues at trial and would have injected into the trial complicated and time-consuming side issues. (App. 1201A-C, 1268U-68W). The ruling was correct.

King's and Boucher's arguments are based upon a mischaracterization of the issues in the case. *Cf. United States* v. *Weiss*, 491 F.2d 460, 464 (2d Cir.), *cert. de-*

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* This was never, in any event, the Government's primary claim as to the damage caused by the scheme to defraud. The Government's main argument was that the loss to FOF could be measured by the per share increase of the value of FOF shares caused by the revaluation multiplied by the number of shares redeemed between the date of the revaluation and the Global spin-off (a total of approximately $18 million), as well as the $10 million fee that was automatically paid to an IOS subsidiary as a management fee as a result of the revaluation, and the approximately $20 million FOF spent after the revaluation to make more purchases from KRC and Colorado Corporation. (App. 1344A-44C). See pp. 28-29, *supra*.

nied, 419 U.S. 833 (1974). The charges against the defendants were not based upon what the actual value of the KRC-FOF arctic permits was in 1969 and 1970 or what it is now. What King and Boucher were charged with was arranging fraudulent transactions that they knew would be used to place a value on the arctic interest, and then concealing and lying about the circumstances that made the transactions fraudulent. Evidence of the value now placed on the arctic in certain studies is simply irrelevant to the questions of whether the transactions used to value the property in 1970 were fraudulent and whether King and Boucher lied about those transactions.

King and Boucher contend that this evidence of current value was relevant to show lack of damage to FOF and lack of specific intent to defraud on their parts. The damage to FOF claimed by the Government, however, was due to the upward revaluation of the net asset value of FOF in 1970 as a result of the fraudulent sales and misrepresentations. Proof, other than the Mecom and COG sales, showing the value of the arctic in 1970 (which Judge Frankel did permit King and Boucher to present) was of slight probative value, since the revaluation was based on the Mecom and COG sales and King's and Boucher's representations about them, and on nothing else. Studies and opinions on the arctic's value in 1976 would be of absolutely no relevance.

The rationale of King's and Boucher's argument appears to be that even if they arranged phony sales in 1969 that they knew would be used to revalue the arctic, and lied about the true circumstances of the sales so the sales would in fact be used for the revaluation, it would be a defense to the charges in the indictment if they could produce studies six years later—which of course were in no way relied upon by anyone in effecting the 1970 revaluation—that showed the property may be

worth what the phony 1969 deals indicated they were worth. Such a notion is absurd, and Judge Frankel properly excluded as irrelevant the evidence proferred to support that position. Again, the issue in the case was not whether the arctic property is worthless or worth a fortune—that is, at best, a question of some dispute—but whether transactions used in 1970 to set a value for the property, and representations made by King and Boucher about those transactions, were fraudulent.*

Similarly, evidence of the arctic's current value is irrelevant to King's and Boucher's intent in arranging and misrepresenting the Macom and COG transactions in 1969 and 1970. King and Boucher appear to be arguing that even if those sales were phony and even if they did lie about them, they had no intent to defraud anyone because they really believed the arctic permits were valuable, and evidence of the area's current value will bear out that theirs was an honest belief. It is axiomatic, however, that no amount of honest belief on the part of

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* The cases cited by King and Boucher in support of this argument are inapposite, as they deal with evidence of the defendant's good faith that was relevant to the false representations or fraudulent scheme with which he was charged. Moreover, by the artful use of elipses, a quotation in Boucher's brief (p. 47) from one of the cases he cites excludes language showing that the admissibility of such evidence depends upon its relation to the scheme alleged:

> "Events occurring after the letters were mailed might shed light upon the intent of defendant when the letters were mailed. *Or they might not. There being no offer of proof, we cannot tell whether the evidence sought to be adduced was so remote or unconnected with the alleged scheme as to throw no light upon the intent of defendant when the letters were mailed.*" *Little* v. *United States*, 73 F.2d 861, 867 (10th Cir. 1934) (italized language excluded from Boucher brief).

defendant that a venture will succeed in such a way that no one suffers any loss will excuse fraudulent actions or false representations by him that may subject others to the possibility of such loss. *United States* v. *Diamond*, 430 F.2d 688, 691-92 (5th Cir. 1970); *United States* v. *Painter*, 314 F.2d 939, 943 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963); *United States* v. *Tellier*, 255 F.2d 441, 449 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *Frank* v. *United States*, 220 F.2d 559, 564 (10th Cir. 1955); *Foshay* v. *United States*, 68 F.2d 205, 210 (8th Cir.), *cert. denied*, 291 U.S. 674 (1934); *Pandolfo* v. *United States*, 286 F. 8, 13 (7th Cir. 1922), *cert. denied*, 261 U.S. 621 (1923). Thus, even assuming that today, more than seven years after the events charged in the indictment, the Canadian arctic permits were valued by some persons at the value the defendants sought to establish for them in 1969 and 1970, it would not be a legal defense and would therefore be irrelevant.*

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* King and Boucher further argue that the current value proof was admissible to rebut the Government's attacks on the reasonableness of the arctic sales price in 1969. The Government attacked the reasonableness of the price only to the extent of arguing that King and Boucher could not find a buyer at that price in 1969 without giving the buyer secret inducements, an argument that was supported by, among other evidence, the testimony of Sweringen and Gordon. While evidence of the area's value in 1976 may be relevant in reconstructing what its value was in 1969 (for assessing damages in a breach of contract case, for example —indeed, all the cases cited by Boucher on this point are civil lawsuits), it has no bearing on what a company or person would have been willing to pay for the property in 1969, especially since the current value evidence would take into account conditions that have changed since 1969 and facts that would not have been known at that time.

King and Boucher also maintain that the evidence was admissible because of an item in the Government's Bill of Particulars charging that they had fraudulently misrepresented that "[t]he value of FOF investments in natural resource projects, in

[Footnote continued on following page]

Moreover, under Rule 403 of the Federal Rules of Evidence, the trial court has discretion to exclude evidence, even if relevant,

> "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Even if the evidence of current value King and Boucher proposed to offer was of some marginal relevance, its exclusion was not an abuse by Judge Frankel of his discretion under Rule 403 in light of the complex tangential issues it would have raised and—since the Government was prepared to present evidence rebutting King and Boucher's claims as to the arctic's current value—the additional litigation it would have caused. (App. 1201A-01E, 1268U-68W, 1269-73). "[Q]uestions relating to the admissibility of evidence, relevancy of proffered evidence and the scope of cross-examination are all questions to be determined subject to the rules of evidence and in

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terms of their future potential, are materially understated as of July 1970," and because a small piece of testimony was introduced showing that King had made such a statement in July 1970. It was never argued to the jury, however, that King's statement was a misrepresentation, especially a misrepresentation for which he could be convicted of fraud. Indeed, the jury was instructed that "predictions and estimates by defendants or others connected with them whether or not those predictions and estimates eventually turned out to be correct or modest or high, are not the central matters in issue in this case." (App. 1210M). In any event, if King's statement about future potential made in July 1970 was false, it was false because of what he knew or did not know at the time he made it, and while subsequent events may show he was a good or bad soothsayer, they have no relevance to his state of mind in July 1970 in making the statement in question.

doubtful cases subject to the discretion of the trial court, the exercise of which may be overturned on appeal solely upon a showing of clear abuse of that discretion." *United States* v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976); see *Hamling* v. *United States*, 418 U.S. 87, 124-25, 127 (1974); *United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *Post* v. *United States*, 407 F.2d 319, 323-26 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969) (exclusion by trial court in mail fraud case, as irrelevant to defendants' efforts to show good faith, of evidence of acts that occurred subsequent to crimes charged).

D. Boucher's Silence in the Face of MacKenzie's Statements on the Sale to COG Was Properly Admitted Against Boucher As an Admission by Silence

Boucher contends that it was reversible error for the trial court to permit him to be cross-examined about statements concerning the sale to COG made in his presence at a KRC Board of Directors meeting in 1971, and then to admit against Boucher his silence in the face of those statements as admissions by silence.* The trial court's ruling was correct.

The setting in which the statements were admitted should first be accurately set forth. Towards the end of the Government's cross-examination of Boucher, Boucher was asked if he was present at a meeting of the KRC Board of Directors on January 29, 1971, and he answered

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* The statements were offered and admitted only against Boucher, and the jury was specifically instructed it should not consider them against King. (App. 1342). This point, therefore, is only applicable to Boucher.

that he was. Boucher was next asked if the lawsuit filed by COG over its arctic purchase was discussed at that meeting, and Boucher answered that he did not recall. (App. 1322E-22G). The questioning continued as follows:

> "Q. Mr. Boucher, at that meeting wasn't there a conversation about the Consolidated Oil & Gas Arctic transaction when it was made back in December, 1969?
>
> A. I don't recall, Mr. Wing.
>
> * * * * *
>
> Q. Mr. Boucher, at that meeting didn't Mr. Neil McKenzie [sic, should be MacKenzie] say to you and the other directors that in his opinion Consolidated Oil & Gas entered into the Arctic transaction without any kind of proper management assessment of the value of that deal?
>
> A. Not that I recall, Mr. Wing.
>
> Q. Didn't Mr. McKenzie say to you and the other directors that any inspection of that Consolidated deal, that the Consolidated Oil & Gas Company had entered into, the board of directors would be the subject of enormous shareholder scrutiny at that price, considering going prices?
>
> MR. MALONEY: Objection, your Honor, and I move for a mistrial. Mr. Wing is deliberately pursuing this with double hearsay and getting prejudicial questions before this jury, knowing he can refresh his recollection, if that is what he is after, with that document on Mr. McKenzie's state of mind or what he is stating about where he gets it from. I move for a mistrial.
>
> THE COURT: I don't know what document you are talking about, but come to the bench.

MR. MALONEY: The minutes.

MR. WING: There is nothing in there, your Honor, that will refresh his recollection on this, and there is an absolute basis in fact for the question I am asking.

THE COURT: All right. Objection overruled. Motion denied.

Q. Isn't it a fact, Mr. Boucher, that at that point Dr. Frederickson said, 'You say the price is too high,' and didn't McKenzie say at that time the price was ridiculous, and isn't it a fact, Mr. Boucher, that you said absolutely not one word to refute that particular statement by Neil McKenzie, the head of your Calgary office?

A. I don't know, Mr. Wing?" (App. 1322G, 1323-24).

The Government thereafter made known to defense counsel its intention of offering in evidence the portion of a tape recording of the board meeting in question * bearing the statements by MacKenzie about which Boucher was questioned. After extended arguments by both sides, Judge Frankel indicated that he would probably permit the Government to play the tape. (App. 1332-40K). Rather than having the tape played, however, Boucher took the stand again and testified that since his prior testimony, he had listened to a tape of the board meeting and that MacKenzie had made the statements about the COG transaction and that Boucher had not responded to them. (App. 1340Z-40AA). Boucher further testified

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* The Government had given a copy of the tape to defense counsel approximately one month before the start of the trial. (App. 1337A).

that the meeting was seven or eight hours long, that he and a KRC lawyer had been working 10 to 12 hours a day during the preceding four days on negotiations with COG, and that he did not respond to MacKenzie's statements because "I wasn't concentrating on this particular aspect at that time, that's all." (App. 1341).

The following testimony was elicited on cross-examination:

> "Q. After that statement [by MacKenzie], Mr. Boucher, did you make some statements about the general problem of whether or not to accept the settlement without any reference at all to Mr. McKenzie's statement about the price being ridiculous?
>
> A. I think that's correct, Mr. Wing, but——
>
> Q. In other words, you responded to McKenzie's general comments but you made no specific reference to that particular statement by him that the price Consolidated paid was ridiculous, am I right?
>
> A. Well, when you say I responded to his general comments, what do you have reference to there?
>
> My recollection of the tapes is that we went right on discussing the various pushes and pulls in the transaction.
>
> Q. Right, and you broke in and discussed from time to time those pushes and pulls, right?
>
> A. Yes, I think that's right.
>
> Q. But you made absolutely no reference at all to McKenzie's comment that the price Consolidated paid was ridiculous?
>
> A. The thrust of the meeting was to get to that settlement agreement and arrive at some conclusions as to what direction we were going in.

Q. I am not asking the thrust of the meeting. I am asking whether you said anything, Mr. Boucher, in response to Mr. McKenzie's statement that the price Consolidated paid was ridiculous.

A. No, I did not." (App. 1342A-43B).

At the charging conference the day before summations, the following colloquy occurred:

"MR. MALONEY: Your Honor, one quick point. That famous tape which was offered or the business about MacKenzie, which was not offered for the truth of it, but whether or not he said the price was high in the Arctic, I take it Mr. Wing is not going to argue that he was giving expert opinion as to the price in the Arctic, simply that he said it and Mr. Boucher did not reply, because we don't have Mr. MacKenzie here to judge his qualifications as either an expert or his knowledge about the background of the COG transaction.

MR. WING: I don't know that I was going to say he was an expert.

* * * * *

THE COURT: If you are not, then Mr. Maloney has no problem." (App. 1342F).

The next day, just prior to summations, the discussion on this point was picked up again.

"MR. WING: Yesterday, your Honor, Mr. Maloney asked if I was going to describe MacKenzie as an expert in referring to MacKenzie's remarks to Boucher and I said no. The fact is, in preparing for the summation, I think I am going to refer to MacKenzie in some of the terms used by Mr. Boucher when he testified as the man

who headed their Calgary houses and one of the two men who got them into the Arctic. Mr. Maloney has an objection.

THE COURT: What is your objection, Mr. Maloney?

MR. MALONEY: My objection is, your Honor, that testimony about MacKenzie was admitted only as an admission by silence on the part of Boucher and not for the truth of it, and now by going into that kind of an argument, Mr. Wing actually is going to be offering it for the truth of that fact, that the price was too high.

THE COURT: I told you at the time, in whatever garbled way I put this, if we were going to start adopting a rule like that, we would have to go back through this whole enormous record and make rulings of that kind about all the things we have put in from directors meetings where nobody ever suggested a view of the kind you are now reasserting. There was no such limitation.

MacKenzie said it and a reasonable jury like anybody else might infer that whether he was crazy at the time or not, he meant it, for whatever that is worth and I will allow it on that basis." (App. 1343-44).

As can readily be seen, MacKenzie's statements were not admitted, as Boucher now contends (Boucher Br. at 55-57), as expert testimony on the value of the arctic. The prosecutor never claimed that he was going to characterize it as such; rather, he merely stated that he planned in his summation to refer to MacKenzie as Boucher had described him in his own testimony. (*E.g.*, (App. 1292CC-92EE, 1301H-01U). Judge Frankel, moreover, never ruled that MacKenzie was qualified to give an

expert opinion on the value of the arctic. Whether MacKenzie was or was not qualified to give such expert testimony was simply not an issue.

Boucher's confusion is reflected in his counsel's statement below that the "testimony about MacKenzie was admitted only as an admission by silence on the part of Boucher and not for the truth of it . . . ." Boucher clearly misses the mark, because an admission by silence is an exception to the hearsay rule—or, more properly, under the Federal Rules of Evidence is not hearsay—and therefore is always admitted for the truth of the adopted assertion. Fed. R. Evid. 801(c), (d)(2)(B). Thus, MacKenzie's statement that the price that COG paid for the arctic properties was "ridiculous"—acquiesced in by Boucher by his silence—was admitted against Boucher for its truth, and it was Boucher's attempt to prevent its admission for that purpose that Judge Frankel rejected. Whether MacKenzie was an expert or a lunatic was plainly irrelevant, since in either event Boucher would presumably have objected to MacKenzie's statements if he believed them to be wrong.*

Moreover, the prosecutor's summation referred to MacKenzie's statements in terms of Boucher's failure to respond and what it showed about Boucher's knowledge, and did not claim that the statements represented expert

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* Of course, if Boucher had thought MacKenzie was a lunatic or had some other low opinion of MacKenzie, it would affect the weight to be given by the jury to Boucher's silence. That is why the Government pointed out, in questioning Boucher when he retook the stand, that Boucher responded to other remarks of MacKenzie soon after the statements at issue, and also why the prosecutor, in his summation, described MacKenzie's position at KRC in terms similar to those used by Boucher in his testimony.

testimony about the arctic's value. Thus, in his opening summation, the prosecutor said in pertinent part:

> "Now, there is one other very significant piece of testimony in this case and that is the testimony about what happened at a directors meeting on January 29, 1971, because at that meeting, when they are talking about the Consolidated deal and whether or not to agree to some settlement Consolidated had offered, Neil McKenzie, who you may recall was the head of the Calgary office, who you may recall, according to Boucher, was one of the two men that was really into the Arctic, had done a lot of field work in the Arctic, knew the Arctic, who was then a director of the company, Neil McKenzie made a statement about that Consolidated deal and he made the statement right in front of Rowland Boucher and everybody else....
>
> * * * *
>
> And, ladies and gentlemen, the fact that Rowland Boucher didn't make a murmer, didn't make a peep about that statement by his No. 1 Arctic man, tells you more than anything you have heard in the last five weeks. It tells you that Rowland Boucher knew that the value of the Arctic that they represented to the Fund of Funds was not the fair market accurate value at all. It tells you that. And you may find that to be an absolute fact.
>
> You may recall, just generally, that McKenzie was the one who in the fall of '69 was trying to sell some of that same acreage to some companies and we have in evidence several letters with his offer and you may recall I asked Boucher whether that offer boiled down to below $5 an acre and Boucher said, 'Oh, no, it was up about $7.50,' and

> then I got the figures from him on the blackboard and did a little division and it came out to four-something. I don't remember what the figure was. You may recall that. That was McKenzie. He is the man who knew." (App. 1345A, 1346-47).

Similarly, in this rebuttal summtaion the prosecutor argued:

> "Mr. Armstrong said you can't question the fact that these men believed in the Arctic. Ladies and gentlemen, that is irrelevant. What counts is whether they believed in what they put down when they said those sales were good arm's length sales with no buy-back guarantee. That is what this case is about.
>
> Whatever they believed the Arctic might be some day, high or low, is totally irrelevant. It is whether they thought that that price that was sold at, that $15 an acre price—excuse me, some people say not $15, it is $7.50 plus, you can add it up—whatever that price was, whether they were representing that was a fair, accurate market value. The man who probably knew that area the best of all in the entire company, Mr. Neil McKenzie, tells Boucher that the price was ridiculous and Boucher doesn't deny it. That is the issue in this case. Was that a fair representation of the market value. That is what the shareholders were entitled to, that is what they were trying to get." (App. 1347).

Boucher's silence in the face of MacKenzie's statements was, in sum, admitted into evidence as an adoption by silence and that is precisely the way it was treated by the Government in its summation.

Judge Frankel's ruling admitting the evidence of Boucher's silence was clearly correct. Wigmore ennunciates the applicable standard for admitting silence as assent to another's statement as follows:

> "Silence *may* imply assent to the correctness of a communication, but on certain conditions only. The general principle of relevancy . . . tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance, or dissent—unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct." 4 J. Wigmore, Evidence § 1071, at 102 (Chadbourn rev. 1972).*

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* See also *Wiedemann* v. *Walpole*, 2 Q.B. 534, 539 (1891), quoted by this Court in *United States* v. *Flecha*, 539 F.2d 874, 877 (2d Cir. 1976), where Lord Justice Bowen held that silence is not an admission "unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not." In *Flecha*, this Court adopted the standard set forth in Wigmore and in *Weidemann* for determining when silence is an admission. 539 F.2d at 876-877.

Boucher does not cite *United States* v. *Lam Lek Chong*, 544 F.2d 58 (2d Cir. 1976), which, at first glance, may appear to support his position. There, conspirator Lam introduced LiGanoza to undercover agents as a nephew of Lam's heroin supplier and said that the supplier had been convinced to scale down his demands for an advance payment for a certain heroin shipment. Further negotiations occurred at the meeting, but LiGanoza never uttered a word.

The Government contended on appeal that LiGanoza had adopted, by his silence, Lam's statements implicating him, and that this adopted admission together with other evidence satisfied the standard of *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), as to LiGanoza's

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Here, Judge Frankel was clearly correct in finding that MacKenzie's statements were such that one would have expected Boucher to dissent if he believed them not to be correct. The statements were made by a KRC director who was one of the persons in the company most knowledgeable about the arctic; they were made to Boucher and the other directors and were heard by Boucher (as evidenced by Boucher's response to statements by MacKenzie that followed his remarks on the terms of the COG sale);* and they were serious accusations concern-

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participation in that alleged conspiracy. This Court, in the text of its opinion, indicated that it was unnecessary to resolve the question whether there had been an adopted admission, since the other non-hearsay evidence of LiGanoza's involvement was sufficient. *Id.* at 65. In a footnote, however, after discussing *United States* v. *Flecha*, the Court went on to say that "we cannot agree that [LiGanoza] specifically acquiesced in Lam's statements. . . ." *Id.* n. 8.

It is difficult to believe that the Court's conclusion that LiGanoza had not "specifically acquiesced" in Lam's statements was intended as a rejection of the Government's adoptive admission contention. This is so, first, because an adoptive admission never involves specific acquiescence; second, because it would be extraordinary for the Court to leave open an issue in the text that it then went on to resolve in a footnote; and, third, because it would be almost impossible to reconcile such a ruling with the Court's previous decision in *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), a case that involved similar facts. In any event, *Lam Lek Chong* certainly cannot be read as going beyond the holding in *Flecha* and ruling that, before an adopted admission can be introduced, something more is required than a finding that it is more likely than not that a response would have been forthcoming had the statement been untrue. In the present case, it is clear that *Flecha's* standard was met.

* "[T]he presence of a party may be assumed to indicate that he heard and understood." 4 J. Wigmore, Evidence §1072, at 116 "wasn't concentrating on this particular aspect at that time, that's all" (App. 1341), an explanation the jury could surely reject. (Chadbourn rev. 1972). Indeed, Boucher did not deny that he heard MacKenzie's remarks. His only explanation was that he

ing a transaction about which Boucher was knowledgeable and, indeed, in which he was intimately involved. *Id.* at § 1072, at 117. See *United States* v. *DiGiovanni*, 544 F.2d 642, 645 (2d Cir. 1976); *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States* v. *Geaney*, 417 F.2d 1116, 1118, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).* It is plain, we submit, that on the facts of this case, it is more likely than not that had Boucher disagreed with MacKenzie's assessment of the COG transaction he would have protested MacKenzie's remarks. In any event, this is an issue best left to the informed discretion of the trial court. Fed. R. Evid. 401.

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* *Compare United States* v. *Flecha*, *supra*, 539 F.2d at 877:

> "We find it hard to think of a case where response would have been less expectable than this one. Flecha was under arrest, and although the Government emphasizes that he was not being questioned by the agents, and had not been given *Miranda* warnings, it is clear that many arrested persons know, without benefit of warnings, that silence is usually golden. Beyond that, what was Flecha to say? If the Spanish verb used by Gonzalez has the same vagueness as 'caught', it would have been somewhat risible for Flecha, surrounded by customs agents, to have denied that he had been. Of course, Flecha could have said 'Speak for Yourself' or something like it, but it was far more natural to say nothing."

Many of the cases in which courts have ruled that it was improper to infer acquiescence from silence have involved situations, as in *Flecha*, where the defendant was under arrest when he did not respond to a statement in his presence. See, *e.g.*, *United States* v. *Hale*, 422 U.S. 171 (1975); *United States* v. *Impson*, 531 F.2d 274 (5th Cir. 1976); *United States* v. *Yates*, 524 F.2d 1282 (D. C. Cir. 1975); *Fowle* v. *United States*, 410 F.2d 48 (9th Cir. 1969); *United States* v. *LoBiondo*, 135 F.2d 130 (2d Cir. 1943). *Compare United States* v. *Wiley*, *supra*, 519 F.2d at 1350 & n.4. Boucher's situation at the KRC board meeting was not, of course, remotely similar to that of an accused under arrest.

Furthermore, the evidence of MacKenzie's statement and Boucher's silence was not offered on the Government's direct case. This was not a case, therefore, where the defendant had no opportunity to explain his silence or where the defendant would have had to relinquish his Fifth Amendment privilege to provide such an explanation. Rather, Boucher was confronted with the evidence on cross-examination, had every opportunity to attempt to explain his silence, and the jury was able to determine, on the basis of his explanation and the circumstances surrounding the incident, what weight, if any, his silence should be given. *Compare United States* v. *Flecha*, 539 F.2d 874 (2d Cir. 1976).

In sum, Boucher's silence in the face of MacKenzie's statements about the COG sale was properly admitted and properly used by the Government.*

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* King and Boucher claim that the Government improperly used MacKenzie's statements to disparage the value of the arctic permits. As the quotes from the Government's summation at pp. 121-22, *supra*, show, however, the Government only argued that Boucher's silence proved he knew the price paid by COG was ridiculous. As pointed out in Point V-C, *supra*, arguing that no one would have paid in 1969 a certain price for the arctic interest without secret inducements is not the same as arguing that the interest was not in fact worth that price in light of what is now known.

Boucher cites *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972), for the proposition that the admission of MacKenzie's statements violated Boucher's rights under the Sixth Amendment's confrontation clause. MacKenzie was not the witness against Boucher; the witness against Boucher was himself. The substantive evidence admitted was not MacKenzie's statements but Boucher's silence in the face of those statements, which is deemed to be an adoption of those statements and an admission by Boucher. See 4 J. Wigmore, Evidence § 1071, at 102 n.1 (Chadbourn rev. 1972). Even if Boucher had called MacKenzie as a witness—which he was free

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E. The Trial Court Did Not Err in Rejecting The Defendants' Request to Charge the Jury That They Must "Fully Understand The Nature of The Proof or The Charges Against Each Defendant" to Convict

King requested the trial court to give the following charge to the jury:

> "You must remember that no conviction can be based on suspicion or conjecture or speculation, no matter how strong. A conviction can only be based on actual proof of guilt beyond a reasonable doubt, and if the proof does not meet that standard, you must acquit.
>
> In this regard, I think you realize by now that you have heard a fairly complex case. I instruct you that if you do not fully understand the nature of the proof or the charges against either defendant, then you must acquit that defendant. This is because, absent such understanding, proof of guilt cannot have been established beyond a reasonable doubt." (Defendant King's Request to Charge No. 23, App. 762A).

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to do—and MacKenzie had testified that he was lying when he made the statements about the COG sale at the 1971 board meeting, it would not change the fact that he made the statements and Boucher did not protest them. Thus, the evidence would, in any event, have been admissible.

Finally, assuming *arguendo* that admission of the MacKenzie statements and Boucher's silence was error, in light of the overwhelming evidence of Boucher's guilt, detailed in the Statement of Facts of this brief, the error was harmless beyond a reasonable doubt. See *United States* v. *Flecha*, 539 F.2d 874, 878 (2d Cir. 1976).

In denying the request, Judge Frankel stated:

> "... I don't give that kind of thing. After telling a jury that they have to be convinced beyond a reasonable doubt it seems to me to be a very self-denying thing to tell them they must not convict on mere suspicion c conjecture or speculation. So I don't use that language." (App. 1342E).

King and Boucher contend that Judge Frankel erred in refusing to give the second paragraph of their request. The trial court's ruling was correct.*

The language of the request was at best misleading, especially the statement that the jury must "fully understand the nature of the proof" in order to convict. Some of the evidence adduced at trial was of a rather technical nature pertaining to the oil and gas business. Such evidence was in part unavoidable background to other more relevant evidence. At other times it appeared that the elicitation of this evidence was part of a defense strategy to make the jury believe that the facts of the case revolved around complex and arcane practices of the oil industry that were beyond the comprehension of a lay-

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* King and Boucher make much of a remark by Judge Frankel early in that case the "I have a question whether anybody will know what a conviction meant, if there is one." (App. 1207). The statement was made in a discussion of the scope of the theory of the Government's case and during an attempt by Judge Frankel to narrow the issues before the jury. The result of the colloquy was an instruction early in the trial by the court to the jury, to which all parties were agreeable, defining the central issues in the case. (App. 1210M). Judge Frankel's rejection of King's request to charge number 23 and his succinct definition in his charge of the issues before the jury (App. 1427-28, 1438-39) more accurately reflect his view of the case than his statement, taken out of context by King and Boucher, early in the trial.

man.* In either event, such evidence was not central to the issues in the case, which were whether King and Boucher gave Mecom and COG secret inducements to make their arctic purchases, and the jury did not have to understand it fully to be able to decide intelligently King's and Boucher's guilt or innocence of the crimes charged.

Moreover, Judge Frankel fully instructed the jury on the Government's burden of proof and the jury's duty to convict only upon a finding of guilt beyond a reasonable doubt. (App. 1419-23). His charge included the admonition that "in a criminal case in our courts the burden of proof on the prosecution is a very high one and . . . you may convict on any count only if in the end your minds unanimously are free of the kind of uncertainty or the kind of hesitation I have described in these instructions." (App. 1423). King's and Boucher's request to charge—for which they cite no legal authority**—would not have added anything useful to Judge Frankel's instructions.

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* See, for example, the cross-examination of Roger L. Davis. (Tr. 511-664).

** King's request to charge no. 23 states that it was adopted from Devitt and Blackmar, Federal Jury Practice and Instructions § 11.01. The cited section, however, contains no language similar to the second paragraph of request 23.

The cases on which Boucher now relies on appeal to support his position that the charge should have been given are equally inapposite. In *United States* v. *O'Connor*, 237 F.2d 466 (2d Cir. 1956), the conviction was reversed not, as Boucher's brief implies, because the Government's evidence was overly long and complicated, but because the trial court failed adequately to instruct the jury on the net worth method in a complicated tax evasion case brought under that theory. In *In re Winship*, 397 U.S. 358 (1970), also cited by Boucher, the Court simply held that the "proof beyond a reasonable doubt" standard must be applied when a juvenile is charged with an act that would constitute a crime if committed by an adult.

King and Boucher desperately try to buttress their argument by disparaging the intelligence and comprehension of the jury, pointing to the relatively short time in which they returned their verdicts. Their insinuations and speculations are a thinly veiled attempt to impeach the jury's verdicts by suggesting they were the results of the jurors' improper motives and inadequate deliberations.* Such a post-verdict attack is impermissible. *United States* v. *Green*, 523 F.2d 229, 235 (2d Cir 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States* v. *Dioguardi*, 492 F.2d 70, 79-80 (2d Cir.), *cert. denied*, 419 U.S. 829 (1974); *Miller* v. *United States*, 403 F.2d 77, 82-84 (2d Cir. 1968); *United States* v. *Crosby*, 294

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* As part of their attack, King and Boucher cite a letter written by an alternate juror, at their request, to Judge Frankel. It is appropriate, therefore, that this Court consider the following unsolicited letter sent to Judge Frankel by one of the jurors who returned the guilty verdicts:

"Dear Judge Frankel:

I served as a member of the jury on the case against John M. King and A. Roland [sic] Boucher, I hope you can understand, that after six weeks of participation in that trial, it became very important to me. I voted guilty along with the others on a purely intellectual level after carefully following the testimony and your instructions—but emotionally it took a great deal out of me. Being that responsible for the course of other men's lives is a tremendous burden to bear. I certainly don't envy your position at all.

Today I opened the Wall Street Journal and the N.Y. Times hoping to find the sentence you imposed and the final disposition of the case—but nothing was reported. Would it be terribly out of line for me to know what has happened? I really would appreciate hearing from you.

The one really positive thing I got from my jury service was a feeling of great pride that people like you and John Wing work for *my* govermnent.

Thank you."

F.2d 928, 949-50 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). In any event, the relatively swift verdicts were not as remarkable as King and Boucher would have one believe in view of the clear-cut and fairly simple issues that the jury had to decide.

The issues in the case were succinctly stated for the jury by Judge Frankel in his charge, without objection from King and Boucher:

> 'While I repeat, you will want to consider all the elements that I am proceeding to lay before you, you may conclude in the end that the focus comes, the critical questions come in connection with two particular sales, the sale to John Mecom and the sale to Consolidated Oil & Gas Company, or COG, as we have come to think of it in this case." (App. 1427-29).

The prosecutor, in his summation, also laid out the basic issues that the jury had to decide:

> "What started as a simple case was made even simpler for you by the defendants because they took the stand and in effect, they refuted, they denied, they rejected what the Government witnesses said. And so, you have a situation where you have different stories. One set of people tell one story; the defendants tell another story. The two stories, ladies and gentlemen, they do not mesh, they do not go together, they do not fit together in any way.
>
> And so, you start out knowing one fact for sure, and that fact is that somebody, somebody in this courtroom in the last five weeks, has gotten on the witness stand, taken an oath to tell the truth and deliberately lied to you. You know that for sure.

> Your job, very simply, is to figure out who it was. Was it these two men or was it Raff, Marriott, Mecom, Lowry, and Hulsey and others." (App. 1844D).

Despite King's and Boucher's arguments to the contrary below and on this appeal, this case was basically quite simple, and in light of the clear-cut issues that the case boiled down to, the speed of the jury's verdicts was not surprising.*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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JOHN R. WING,
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* King's and Boucher's final argument is that the "cumulative effect" of the alleged errors below deprived them of a fair trial. On the record of this case, this contention is somewhat akin to trying to make a silk purse out of five sows' ears. Suffice it to say that the arguments made in King's and Boucher's briefs do not amount to error—let alone prejudicial error—when added together any more than they do standing alone, and that the facts adduced at trial fully support Judge Frankel's post-trial observation that "the proof of [King's and Boucher's] guilt [was] powerful to the point of near certainty." (App. 29).

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

PAUL VIZCARRONDO, JR., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the day of February, 1977 he served a copy of the within two copies of Brief on Appeal by placing the same in a properly postpaid franked envelope addressed:

Michael F. Armstrong, Esq.
Barrett, Smith, Schapiro & Simon
26 Broadway
New York, NY 10004

Andrew J. Maloney, Esq.
Maloney, Viviani & Higgins
630 Fifth Avenue
New York, NY 10020

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing within the United States Courthouse Annex, One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Paul Vizcarrondo, Jr.
PAUL VIZCARRONDO, JR.
Assistant United States Attorney

Sworn to before me this

25th day of February, 1977.

Jeanette Ann Grayer
NOTARY PUBLIC

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1977